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TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, [redacted] 1905.

No. [redacted] 37.

JOHN J. COCHRAN AND THE FIDELITY AND DEPOSIT COMPANY OF MARYLAND, PLAINTIFFS IN ERROR,

vs.

THE COUNTY OF MONTGOMERY.

IN ERROR TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT.

FILED MAY 31, 1904.

(19,377.)

(19,377.)

SUPREME COURT OF THE UNITED STATES.

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UNITED STATES OF AMERICA,
Fifth Judicial Circuit.

Pleas and proceedings had and done at a regular term of the United States circuit court of appeals for the fifth circuit, begun on the third Monday of November, 1903, and held in the courtroom of said court, in the city of New Orleans, before the Honorable Don A. Pardee, the Honorable A. P. McCormick, and the Honorable David D. Shelby, United States circuit judges for the fifth judicial circuit.

JOHN J. COCHRAN ET AL., Plaintiffs in Error,
versus
COUNTY OF MONTGOMERY, Defendant in Error. } No. 1343.

Be it remembered, that heretofore, to-wit: on the 3rd day of March, 1904, a transcript of the record of the above styled cause from the circuit court of the United States for the middle district of Alabama, was filed in the office of the clerk of said United States circuit court of appeals for the fifth circuit, in the words and figures following, to-wit:

AT A TERM OF THE CIRCUIT COURT of the United States for the Middle District of Alabama, in the Fifth Judicial Circuit, begun and held at Montgomery, on the first Tuesday in December, it being the 1st day of said month, in the year of our Lord one thousand nine hundred and three. Present and presiding, Hon. Thos. G. Jones, United States District Judge for the Northern and Middle District of Alabama, sitting as Circuit Judge, Wednesday, Feb'y. 3, 1904, it being a day of said term, the following proceedings were had:

IN THE CIRCUIT COURT OF THE UNITED STATES FOR THE MIDDLE DISTRICT OF ALABAMA.

PETITION FOR THE REMOVAL OF SAID CAUSE FROM THE CITY COURT OF MONTGOMERY, ALABAMA.

COUNTY OF MONTGOMERY, Plaintiff,

versus No. 808.

JOHN J. COCHRAN, AS PRINCIPAL, AND THE FIDELITY & DEPOSIT COMPANY OF MARYLAND, A CORPORATION UNDER THE LAWS OF THE STATE OF MARYLAND, Defendants.

To the Honorable the Judges of the Circuit Court of the United States for the Middle District of Alabama:

Your petitioner, the above named Fidelity & Deposit Company of Maryland, a corporation existing under the laws of the State of Maryland, respectfully shows to this Honorable Court that the County of Montgomery, as plaintiff, brought suit of a civil nature in the City Court of Montgomery County, Alabama, on the 21st day of January, 1902, against your petitioner, The Fidelity & Deposit Company of Maryland, and one John J. Cochran, and that the matters or amount in dispute in said cause exceeds the sum or value of two thousand dollars ($2,000) exclusive of interest and costs. That service of process in said cause was made on your petitioner on the 24th day of January, 1902, and that the time for pleading or demurring to said complainant is within thirty days after the said service;

and that your petitioner has heretofore, viz: on the fif-
2 teenth day of February, 1902, appeared in said City Court of Montgomery and demurred to said complaint; and a copy of said complaint and the demurrer thereto is hereto attached and made a part hereof; and the first trial term for said cause is in the month of April, 1902.

That the said controversy is between citizens of different States, in that the plaintiff was at the time of the commencement of said suit, and still is, a citizen of the State of Alabama; and that your petitioner, The Fidelity & Deposit Company of Maryland, was at the time of the commencement of this suit, and still is, a citizen of the State of Maryland, and of no other State, having its principal office in the City of Baltimore, in the State of Maryland, and that the other defendant in said suit is a citizen of the State of Alabama, and that your petitioner desires to remove this suit, which is now pending and undetermined in said State Court, before the trial thereof, into the Circuit Court of the United States, to be held in the Middle District of Alabama.

Your petitioner further shows unto this Honorable Court that from prejudice and local influence in favor of the plaintiff, and adverse to this defendant, it will not be able to obtain justice in said Court, or in any other State Court to which the defendant may, under the laws of this State, have a right to remove said cause, on account of said prejudice or local influence. And in this connection, your petitioner further shows unto your Honors that said above mentioned suit is a suit instituted by a political sub-division of the State of Alabama, to-wit: Montgomery County, against the said John J. Cochran, the treasurer of said Montgomery County, and your petitioner, a surety company, as surety on the official bond of said John J. Cochran, as treasurer of said Montgomery County, and that said suit is instituted by said county of Montgomery to recover the sum of one hundred and twenty thousand dollars—which last mentioned sum is the penalty of said bond—alleged to have been deposited by the said John J. Cochran, as such county treasurer, in the banking house of Josiah Morris & Company, of Montgomery, Alabama, whereby the said sum is alleged to have been lost to the said County of Montgomery by reason of the failure and insolvency of the said Josiah Morris & Company; and that by reason of the nature of said suit, all the residents and citizens of said Montgomery County have a direct interest in the recovery by the said plaintiff of the amount claimed.

And in this connection, your petitioner further shows unto your Honors, that the other defendant in this suit, John J.

Cochran, is practically financially irresponsible, in that
3. his assets, your petition is informed and believes, and
so states, are less than five thousand dollars, and that the said Cochran is, therefore, practically only a nominal party to the said suit, and that your said petitioner, the said Fidelity & Deposit Company of Maryland, would be obliged to meet practically the whole claim, should judgment be recovered against the defendants; and your petitioner further shows that from time to time heretofore there have been statements made in the public press to the effect that your petitioner is and will be held liable for the amount claimed in said suit, and will have to pay the same, and that said publications as made in papers published in the City of Montgomery, and in other cities in the State of Alabama, have been circulated throughout all the counties in the said State of Alabama, whereby a local prejudice against your petitioner, and influence in favor of the plaintiff in said suit, has been created throughout the whole of said State of Alabama.

Petitioner further avers that the amount sought to be recovered in said suit was, at the time of the failure of said Josiah Morris & Co., substantially all of the funds of the plaintiff, and the inconvenience to said plaintiff from its inability to use said money for public purposes has caused a feeling of prejudice against your petitioner, not only in the county of Montgomery, but in the other parts of the State of Alabama. Petitioner further avers that the matter of a change of venue in said case is one of discretion on the part of the Judge of said City Court, and not one of right belonging to said petitioner, and, even if said discretion should be exercised in favor of the removal of said cause to some other county, yet, petitioner is informed and believes and upon such information and belief states, that the wide publicity and notoriety given to this cause and the issues involved therein would operate in any county or Court of the State of Alabama to prejudice the rights of this petitioner. And petitioner further avers that the said petitioner is now the surety on bonds of many State and County officers throughout the whole State of Alabama, and that the decision in the present case will be regarded as probably constituting a precedent in any future case or cases which may be brought against your petitioner on said bonds, by reason of which there will necessarily exist a local prejudice against your petitioner in this case in any county of the State of Alabama in which said case should be tried.

Petitioner further avers that the said banking house of Josiah Morris & Company, at the time of its failure, was largely indebted, viz: about nine hundred thousand dollars, and that this

indebtedness was due, and much the larger part of it
4 is still due, to various persons residing in different parts of the State of Alabama. including the City Council of Montgomery; that the said Josiah Morris & Company secured an agreement with its respective creditors for an extension of time within which to pay them amount due to them, respectively, and the said Josiah Morris & Company has failed to make the second of the payments thus agreed on, and there seems to be no present prospect of any further payments by the said Josiah Morris & Co. to its creditors, by reason of which, as petitioner is informed and believes, and on such information and belief states, there exists great dissatisfaction and disappointment amongst creditors of said Josiah Morris & Co., scattered throughout various parts of the State of Alabama, and petitioner is informed and believes and upon such information and belief states, that the suit brought against petitioner has been in some way intermingled with the affars of said Josiah Morris & Co. in the minds of the people, and in the supposed identity of the interests of the said Josiah Morris & Co. and petitioner in the matters referred to, there will exist in any Court of the said State of Alabama in which said case could be tried a local prejudice against your petitioner.

Wherefore your petitioner prays that an order or decree may be made and entered, directing and commanding that the trial of said cause be removed from said City Court of Montgomery into the Honorable Court, and petitioner will ever pray, &c.

WATTS, TROY & CAFFEY,
Attorneys for Petitioner.

AFFIDAVIT.

In the Circuit Court of the United States for the Middle District of Alabama.

County of Montgomery, Plaintiff,
vs.
John J. Cochran, as Principal, and The Fidelity & Deposit Company of Maryland, a corporation under the laws of the State of Maryland, as surety, Defendants.

United States of America,
Middle District of Alabama, ss.

Before me, Thomas G. Jones, Judge of said Court, personally appeared Thomas A. Whelan, who is known to me, and

who, being duly sworn, on oath deposes and says, that
5 he is the vice-president of The Fidelity & Deposit Company of Maryland, the above named petitioner, in the above entitled cause, which is now pending in the City Court of the County of Montgomery and State of Alabama, and authorized to make this affidavit and act in this matter for petitioner, and that from prejudice and local influence the said petitioner will not be able to obtain justice in said State Court, or any other State Court in which it may, under the laws of said State, have the right, on account of said prejudice or local influence, to remove said cause; and, further, that all the matters and facts stated in the above petition to be true, are true; and that all matters stated upon information and belief are true to the best of his knowledge, information and belief.

THOMAS A. WHELAN.

Subscribed and sworn to before me, on this 15th day of February, 1902.

THOS. G. JONES, Judge.

The State of Alabama,
Montgomery County.
To any Sheriff of the State of Alabama—Greeting:

You are hereby commanded to summon John J. Cochran and The Fidelity and Deposit Company of Maryland, a corporation existing [under] the laws of Maryland, to appear before the City Court of Montgomery in and for said county, at the place of holding the same, within thirty days from the service of this summons and complaint, then and there to demur or plead to the complaint of The County of Montgomery, and you are commanded to execute this process instanter and make return as required by law.

Witness my hand this 21st day of January, A. D. 1902.

H. H. MATTHEWS, Clerk.

COMPLAINT.

In the City Court of Montgomery—Term 190..

The State of Alabama,
Montgomery County.

The County of Montgomery, Plaintiff;

John J. Cochran, as principal, and the Fidelity and Deposit Company of Maryland, a corporation existing under the laws of the State of Maryland, as surety, defendants.

The plaintiff claims of the defendants the sum of one hun-

dred and twenty thousand dollars as damages for the
6 breach of the condition of the official bond of John J. Cochran, the defendant, as county treasurer of Montgomery County, Alabama, executed by the said John J. Cochran, as principal, with the Fidelity and Deposit Company of Maryland, a corporation existing under the laws of the State of Maryland, as his surety on his said official bond, on the 17th day of August, 1900, and payable to the plaintiff, the said Montgomery County, Alabama, in the sum of one hundred and twenty thousand dollars, said bond approved by J. B. Gaston, Judge of the Probate Court of Montgomery County, Alabama, on the 24th day of August, A. D. 1900, being in words and figures as follows, viz.:

The State of Alabama,
Montgomery County.

Know all men by these presents: That we, John J. Cochran, of the State and county aforesaid, and the Fidelity and Deposit Company of Maryland, a corporation of Maryland, as surety, are held and firmly bound unto the County of Montgomery in the sum of one hundred and twenty thousand dollars ($120,000.00) for the payment of which, well and truly to be paid and done, we bind ourselves, our heirs, executors, administrators and assigns, firmly by these presents.

Sealed with our seals and dated this 17th day of August, A. D. 1900.

The condition of the above obligation is such that whereas the above bound, John J. Cochran, was on the 6th day of August, 1900, elected treasurer of Montgomery County, in and for said county. Now, if the said John J. Cochran shall faithfully discharge the duties of such office during the term he continues therein, or discharges any of the duties thereof, then the above obligation to be void, otherwise to remain in full force and effect.

JOHN J. COCHRAN, [L. S.]
FIDELITY AND DEPOSIT COMPANY OF MARYLAND,
By R. F. MANLEY, Atty. in Fact. [L. S.]

Approved and ordered of record, this the 24th day of August, A. D. 1900. J. B. GASTON,
(U. S. R. Stamp, 1.64). Judge Probate, Montgomery County."

The plaintiff alleges that the said John J. Cochran was elected treasurer of Montgomery County on the 6th day of August, 1900, and qualified as required by law, and has acted as treas-

urer of said Montgomery County from the 24th day
7 of August, 1900, and is now acting as such treasurer, and the plaintiff avers that said John J. Cochran as aforesaid has broken the condition of his official bond in this: that the said Cochran, as treasurer as aforesaid, having possession of said sum of one hundred and thirty thousand dollars, by virtue of being treasurer of said county, made a general deposit of said sum in the banking house of F. M. Billing, doing business under the firm name of Josiah Morris & Co., in the City and County of Montgomery and State of Alabama, which said sum of money said plaintiff avers the said John J. Cochran as such treasurer received and collected for the plaintiff, Montgomery County. And plaintiff avers that by reason of said unlawful general deposit in the said bank as aforesaid, by the said defendant, the said plaintiff has suffered loss in the sum of one hundred and thirty thousand dollars to the damage of the plaintiff as aforesaid.

2. The plaintiff, Montgomery County, claims of the defendant, John J. Cochran, the further sum of one hundred and twenty thousand dollars for the breach of the condition of the official bond of the defendant, John J. Cochran, as county treasurer of Montgomery County, said bond made by John J. Cochran, as principal, with the Fidelity and Deposit Company of Maryland, a corporation under the laws of the State of Maryland, as his surety, on his official bond, on the 17th day of August, 1900, and payable to the plaintiff, said County of Montgomery, in the sum of one hundred and twenty thousand dollars, and approved by J. B. Gaston, Judge of the Probate Court of Montgomery County, Alabama, on the 24th day of August, 1900, with condition as follows, viz: The condition of the above obligation is such that whereas the above bound John J. Cochran was on the 6th day of August, 1900, elected treasurer of Montgomery County, in and for said county. Now if the said John J. Cochran shall faithfully discharge the duties of such office, during the term he continues therein, or discharges any of the duties thereof, then the above obligation to be void, otherwise to remain in full force and effect."

And plaintiff avers that John J. Cochran was elected treasurer of Montgomery County on the 6th day of August, 1900, and qualified as required by law, as aforesaid, and has acted as treasurer of Montgomery County since the 24th day of August, 1900, and is now acting as such treasurer; and plaintiff avers that the condition of said bond has been broken by the defendant in this: that the said John J. Cochran, as treasurer as aforesaid, lawfully received the sum of one hundred and thirty thousand dollars, the property of the plaintiff, which it was his

duty to keep safely, and that he failed to keep the
8 same safely as he was required by law to do, but converted the same by depositing it subject to check in the banking house of F. M. Billing, doing business under the firm name of Josiah Morris & Co., in the City and County of Montgomery and State of Alabama, and that said plaintiff has suffered loss in the sum of one hundred and thirty thousand dollars to the damage of the plaintiff, as aforesaid.

3. The plaintiff claims of the defendants the further sum of one hundred and twenty thousand dollars as damages for the breach of the condition of the official bond of the defendant, John J. Cochran, as county treasurer of Montgomery County, made by the said John J. Cochran as principal, with the Fidelity and Deposit Company of Maryland, a corporation under the laws of Maryland, as his surety, on his said official bond, on the 17th day of August, 1900, and payable to the plaintiff, Montgomery County, in the sum of one hundred and twenty thousand dollars; said bond approved by J. B. Gaston, Judge of the Probate Court of Montgomery County, with condition as follows, viz: The condition of the above obligation is such, that, whereas, the above bound, John J . Cochran, was on the 6th day of August ,1900, elected treasurer of Montgomery County, Alabama, in and for said county.

Now, if the said John J. Cochran shall faithfully discharge the duties of such office during the term he continues therein, or discharge any of the duties thereof, then the above obligation to be void, otherwise to remain in full force and effect."

And the plaintiff avers that the said John J. Cochran was elected county treasurer of Montgomery County on the 6th day of August, 1900, and qualified as required by law, and has acted as treasurer of Montgomery County from August 24th, 1900, and is still acting as such treasurer, and plaintiff further avers that the said John J. Cochran, as such treasurer, has broken the condition of his official bond in this: That said John J. Cochran, as treasurer as aforesaid, came into lawful possession of one hundred and thirty thousand dollars of money of plaintiff, and deposited the same to his individual account, and individual credit, in the banking house of F. M. Billing, doing business under the name of Josiah Morris & Company, in Montgomery County, Alabama, by which said conversion the amount of one hundred and thirty thousand dollars has been lost to the plaintiff, Montgomery County, to the damage of the plaintiff as aforesaid.

4. The plaintiff claims of the defendants the further sum of one hundred and twenty thousand dollars as damages for the breach of the condition of the official bond of John J. Cochran,

as county treasurer of Montgomery County, Alabama,
9 executed by the defendant, John J. Cochran, as principal, with the Fidelity and Deposit Company of Maryland, a corporation under the laws of the State of Maryland, as surety on his official bond, on the 17th day of August, A. D. 1900, and payable to the plaintiff, the County of Montgomery, in the sum of one hundred and twenty thousand dollars, said bond approved by J. B. Gaston, Judge of the Probate Court of Montgomery County, Alabama, on the 24th day of August, A. D. 1900, with condition, as follows, viz: The condition of the above obligation is such, that whereas the above bound, John J. Cochran, was on the 6th day of August, A. D. 1900, elected treasurer of Montgomery County, in and for said county. Now, if the said John J. Cochran shall faithfully discharge the duties of such office, during the term he continues therein, or discharges any of the duties thereof, then the above obligation to be void, otherwise to remain in full force and effect." And the plaintiff avers that the said John J. Cochran was elected treasurer of Montgomery County on the 6th day of August, 1900, and qualified as required by law, and has acted as treasurer of Montgomery County from August 24th, 1900, and is still acting as such treasurer, and plaintiff further avers that said John J. Cochran, as such treasurer, has broken the condition of his official bond in this: That said John J. Cochran as treasurer as aforesaid, while acting county treasurer, and performing the duties of such office, received and collected for the plaintiff, by virtue of his office, from George W. Hails, tax collector for said Montgomery County, the following several sums of money, viz: On December 14th, 1900, $4867.96; on Dec. 10th, 1900, $6000.00; on December 18th, 1900, $6723.27; on Dec. 26th, 1900, $1123.58, and on Jan. 10th, 1901, $23.000.00, and on Jan. 2, 1901, $2067.34; and from J. B. Gaston, Probate Judge of said Montgomery County, the following several sums of money, viz: on Jan. 8th, 1901, $526.41; on Jan. 14th, 1901, $2118.19; on Jan. 21st, 1901, $1415.37; and the further sum from Charles A. Allen, clerk of the board of revenue of said Montgomery County, on the 8th day of January, 1901, $111,-109.58, and from H. H. Matthews, clerk of the City Court of Montgomery County, on the 10th day of January, 1901, the sum of $1404.69; and plaintiff avers that each of said several sums of money was collected by the defendant, John J. Cochran, for the plaintiff, and which said several sums of money was turned over and paid to the said defendant as was required by law, and plaintiff further alleges that it was the duty of said John J. Cochran, as treasurer of Montgomery County, to faithfully keep

and preserve the said money so collected for said plain-
10 tiff as aforesaid and disburse the same only on the order of the agent of said plaintiff; and plaintiff further avers that said Cochran unlawfully made a general deposit of each of said several sums of money paid over to, and received by him, as county treasurer, in the banking house of F. M. Billing, doing business under the name of Josiah Morris & Co. in the County of Montgomery, Alabama, and after such general deposit the said John J. Cochran did knowingly, by and in violation of his official duty, permit the said F. M. Billing, as aforesaid, to use each of said several sums of money whereby the same was lost to plaintiff to the damage of plaintiff, in the sum of one hundred and twenty thousand dollars.

5. The plaintiff claims of the defendants, John J. Cochran, as principal, and the Fidelity & Deposit Company of Maryland, a corporation under the laws of the State of Maryland, as surety, the sum of one hundred and twenty thousand dollars, for the breach of the condition of his official bond, made by the defendant, on the 24th day of August, 1900, and payable to the plaintiff in the sum of one hundred and twenty thousand dollars, said bond was approved by J. B. Gaston, Judge of the Probate Court of Montgomery County, Alabama, on the 24th day of August, 1900, with the condition as follows: The condition of the above obligation is such that whereas the above bound, John J. Cochran, was on the 6th day of August, 1900, elected treasurer of Montgomery County. Now, if the said John J. Cochran shall faithfully discharge the duties of such office during the time he continues therein, or discharges any of the duties thereof, the above obligation to be void, otherwise to remain in full force and effect"; and the plaintiff avers that the said John J. Cochran was elected treasurer of Montgomery County on the 6th day of August, 1900, qualified as required by law, and has acted as treasurer of Montgomery County, since the 24th day of August, 1900, and is now acting as such treasurer; that on the 1st day of September, 1900, John J. Cochran, while acting as such treasurer, duly appointed and constituted John P. Kohn his agent, deputy or attorney in fact, under the following power of attorney:

"The State of Alabama,
Montgomery County.

Power of Attorney.

I, John J. Cochran, of said county, hereby constitute and appoint John P. Kohn, of Montgomery, Alabama, my true and lawful attorney to receive and receipt for in my name, all

11 moneys coming into my possession as treasurer of the County of Montgomery, Alabama, and in my name, as treasurer, to pay out all money required by law to be paid by me upon checks signed by the clerk of the board of revenue of said Montgomery County, and further to make reports, keep all books required by law, to be made or kept by me as such county treasurer, and to do and perform all acts and things I might lawfully do in my own name, as such county treasurer, and I hereby ratify and confirm all the acts and things that may be done by the said John P. Kohn, acting as my agent under the authority of this power, as if the same were done in person by myself.

In witness whereof, I have hereunto set my hand and affix my seal, this September 1st, A. D. 1900.

JOHN J. COCHRAN, [L. S.]
As Treasurer of Montgomery County, Alabama. (Stamp 25c)
Witnesses:
E. P. MORRISSETT,
BIBB GRAVES."

That said power of attorney is of record in probate office of Montgomery County in book 46 of deeds, on page ....

That said John P. Kohn was until the 25th day of January, 1901, an officer or employe of the banking house of Josiah Morris & Company, conducted by F. M. Billing; that under an act "entitled an act to authorize the board of revenue of Montgomery County to issue bonds of said county for an amount not to exceed one hundred thousand dollars for the purpose of building and improving the public roads of the county upon a permanent and well considered system and for erecting bridges in said county," approved December 13th, 1900. The board of revenue of Montgomery County, under authority of said act, issued, negotiated and sold on the 8th day of January, 1901, one hundred thousand dollars of road and bridge bonds to Josiah Morris & Company at and for the sum of $111,109.58; that said John P. Kohn tendered to Chas. A. Allen, clerk of the board of revenue of said county, in payment of said bonds a check for $111,109.58 on the bank of Josiah Morris & Co., which said check said Allen refused to accept, informing said Kohn that he must have the receipt of the county treasurer for said sum of money; that said Kohn left the office of the board of revenue in the courthouse and returned shortly afterwards with the following receipt, and handed same to said Allen:

12 "The State of Alabama,
Montgomery County.

Office of County Treasurer.
No. 507. Montgomery, Ala., Jan. 8th, 1901.

Received from board of revenue of county $111,109.58, proceeds sale $100,000.00 bonds.
$111,109.58.

JOHN J. COCHRAN,
County Treasurer.
By JOHN P. KOHN, his Atty."

That said Kohn while acting under said power of attorney in and for said Cochran as treasurer, did on the 8th day of January, 1901, make the following entry upon the cash book of the treasurer of Montgomery County, to-wit: "Jan'y. 8th, 1901, Board of Rev. Sale of $100,000.00 bonds $111,109.58," and plaintiff alleges that the condition of said official bond has been broken by the defendant in this: that the said John J. Cochran, as such treasurer, did unlawfully, and knowingly, permit said John P. Kohn to make a general deposit of the money, the proceeds of the sales of said bonds, to-wit: the sum of $111,109.58, and all other money of the County of Montgomery amounting in the aggregate to the amount of one hundred and thirty thousand dollars, which came into his hands as treasurer aforesaid, in the private bank of F. M. Billing, doing business under the name of Josiah Morris & Company, and after said deposit, the said John J. Cochran did knowingly and in violation of his official duty, permitted said F. M. Billings, doing business under the name of Josiah Morris & Company, to use and convert to his own use, all the proceeds of the sale of said bonds, as well as all other money of the county, which came into his hands as treasurer aforesaid in the amount of one hundred and thirty thousand dollars, to the damage of the plaintiff as above stated.

JOHN G. FINLEY,
J. F. STALLINGS,
Attys. for Plaintiff.

Filed in office this 21st day of January, 1902.

H. H. MATTHEWS,
Clerk.

This is a branch of the original summons and complaint in this cause and when executed and returned will constitute one and the same cause of action.

H. H. MATTHEWS,
Clerk.

Received January 23, 1902.

ANDREW W. BURGIN,
Sheriff.

13 Executed the within summons and complaint on Fidelity & Deposit Company of Maryland, a corporation, by serving a copy on R. F. Manley, agent of said Co., this the 24th day of Jany., 1902.

ANDREW W. BURGIN,
Sheriff Jefferson Co.
By GEO. W. COUSSON,
D. Sheriff.

THE SEPARATE DEMURRER OF THE FIDELITY & DEPOSIT COMPANY OF MARYLAND.

In the City Court of Montgomery.

The County of Montgomery
vs.
John J. Cochran, as Principal, and the Fidelity & Deposit Company of Maryland, a Corporation, as Surety, Defendants.

Comes the Fidelity & Deposit Company of Maryland, one of the defendants in the above stated cause, and separately demurs to the complaint therein, and as grounds of demurrer assigns the following:

1. No cause of action against this defendant is stated therein.
2. No breach of the bond sued upon is stated in said complaint.
3. No right of action in favor of or running to the plaintiff is stated in said complaint.
4. It is not shown by the complaint that the plaintiff has suffered any injury by reason of any breach of said bond sued upon.
5. The said John J. Cochran, as county treasurer of Montgomery County, is made by law the custodian of the funds sought to be recovered herein, and no reason is shown why there should be a recovery of the same or the value thereof in favor of the plaintiff.
6. It appears in and by said complaint that the said John J. Cochran is the treasurer of said County of Montgomery, and as such is entitled to retain the custody of all the funds of plaintiff.
7. It is not averred or shown by said complaint that it has ever become the duty of said Cochran, as county treasurer, to pay to plaintiff or any one else any part of the fund described in the complaint or any amount on account thereof.

14 8. There is a misjoinder of counts in said complaint for that in and by the 1st, 3rd, 4th and 5th counts thereof a recovery is sought from this defendant and from the said Cochran, and in and by the second count thereof a recovery is sought from said Cochran alone.

And this defendant separately and severally demurs to each of the counts of said complaint from one to five, both inclusive, and as grounds of demurrer assigns separately and severally each of the grounds of its demurrer hereinabove to said complaint as a whole, and in addition thereto the following:

1. It does not appear from the said count but that the said Cochran, as county treasurer, has in possession all the money of plaintiff which he has heretofore received as treasurer.

2. It does not appear in and by said count, but that, notwithstanding said deposit of said money described therein, the said Cochran has recovered the same, and now has it in his possession.

3. It is averred as a conclusion of the pleader that the plaintiff has lost said money by reason of said deposit in said bank, and no facts are averred in support of said conclusion.

4. It is not averred or shown that any demand has been made upon the said Cochran for the payment of said money or any part thereof.

5. The said Cochran is entitled to the possession of said money, and is required by law to pay it out upon a warrant or warrants properly and legally drawn, and it is not averred or shown that any warrant has been drawn upon him for the payment of any of said money, or that he has failed to pay any warrant so drawn upon him as such treasurer.

6. It is not averred or shown when the said Cochran deposited the said money in bank, or whether such deposit was made before or after the execution of the bond sued upon.

7. It is not averred or shown in said count that the said Cochran never received back from or checked out of said bank in payment of lawful warrants the money which in and by said count it is averred he deposited in said bank.

And this defendant assigns as additional grounds of its said demurrer to the second count of the complaint the following:

1. In and by said count it is not sought to recover of this defendant, but only from said Cochran.

2. The said count is improperly joined with the other counts in said complaint, for that in and by said second count, a recovery is sought from said Cochran alone, while by all the other counts the recovery is sought from both the said Cochran and this defendant.

15 3. No facts are averred or shown in said count whereby any liability has been imposed upon this defendant for any of the matters and things therein set forth.

Wherefore, this defendant prays judgment whether it shall be further required to answer said complaint or any of the counts thereof.

WATTS, TROY & CAFFEY,
Attorneys for Defendant named.

(Indorsed:) In the City Court of Montgomery. No. 2005, County of Montgomery vs. John J. Cochran and Fidelity & Deposit Co. of Maryland. Demurrer of Fidelity & Deposit Co. of Md. to complaint. Filed in office Feby. 15, 1902, 9:32 A. M. H. H. Matthews, Clerk.

Filed Feby. 15, 1902.

J. W. DIMMICK,
Clerk.

BOND FOR REMOVAL OF SAID CAUSE FROM CITY COURT OF MONTGOMERY.

State of Alabama,
Montgomery County.

The Fidelity & Deposit Company of Maryland, as principal, and William A. Saffold and Thomas H. Watts, as sureties, are held and firmly bound unto the County of Montgomery in the sum of one thousand dollars, well and truly to be paid, and for the full payment of which we bind ourselves and each of us, jointly and severally, our and each of our heirs, executors, administrators and assigns. Given under our hands and seals, this fifteenth day of February, 1902.

The condition of the above obligation is such, that whereas, heretofore, to-wit: on the 15th day of February, 1902, said The Fidelity & Deposit Company of Maryland filed in the Circuit Court of the United States for the Middle District of Alabama its petition in writing verified by affidavit, stating that it and one John J. Cochran had been sued in the City Court of Montgomery by the County of Montgomery as plaintiff, and praying that said cause be removed from said City Court of Montgomery to said Circuit Court of the United States for the Middle District of Alabama; and whereas, said order or removal of said cause has been granted upon entering into this obligation;

Now, therefore, if the said The Fidelity & Deposit Company of Maryland shall enter in the Circuit Court of the United

States for the Middle District of Alabama, on or before
16 the first day of its next session, a copy of the record in said suit, and shall well and truly pay all costs and damages that may be awared by said Circuit Court of the United States if said Court shall hold that said suit was wrongfully or improperly removed thereto, or that the same should be remanded to the City Court of Montgomery, then this obligation shall be void; otherwise it shall remain in full force and virtue.

THE FIDELITY & DEPOSIT
COMPANY OF MARYLAND,
[Seal] By THOMAS A. WHELAN,
Vice-President.
WILLIAM A. SAFFOLD, [L. S.]
THOMAS H. WATTS. [L. S.]

Approved this Feby. 15th, 1902.
THOS. G. JONES, Judge.

Filed Feb. 15, 1902.

J. W. DIMMICK,
Clerk.

ORDER OF REMOVAL OF THE CAUSE.

In the Circuit Court of the United States for the Middle District of Alabama.

County of Montgomery, Plaintiff,
vs.
John J. Cochran, as Principal, and The Fidelity & Deposit Company of Maryland, a Corporation under the laws of the State of Maryland, as Surety, Defendants.

Order.

The Fidelity & Deposit Company of Maryland, having duly filed in this Court a petition in writing, duly vertified by the affidavit of Thomas A. Whelan, vice-president of said company, praying that the said cause be removed from the City Court of Montgomery into the Circuit Court of the United States for the Middle District of Alabama; and it appearing to this Court that, from local prejudice or local influence, The Fidelity & Deposit Company will not be able to obtain justice in said City Court of Montgomery, or in any other State Court to which the said The Fidelity & Deposit Company may, under the laws of

the State of Alabama, have the right, on account of said prejudice or local influence, to remove said cause; and whereas this Court is of the opinion that said case should be removed to this Court upon the execution by the petitioner of a bond in the penalty of one thousand dollars, with surety or sureties to be approved by this Court, conditioned that said The Fidelity & Deposit Company of Maryland shall enter into the Circuit Court of the United States for the Middle District of Alabama on or about the first day of its next session a copy of the record in this suit, and shall well and truly pay all costs and damages that may be awarded by said Circuit Court of the United States if said Court shall hold that said suit was wrongfully or improperly removed thereto, or that the same should be remanded to the City Court of Montgomery; and whereas, The Fidelity & Deposit Company of Maryland has executed and delivered said bond, which is hereby approved;

17

Now, therefore, it is ordered, adjudged and decreed by the Circuit Court of the United States for the Middle District of Alabama, that the above stated cause be and it is hereby removed from said City Court of Montgomery, of the State of Alabama, into the said Circuit Court of the United States for the Middle District of Alabama.

And it is further ordered that a copy of this petition and order, certified by the Clerk of this Court, under the seal of this Court, shall be transmitted by the clerk of this Court to the City Court of Montgomery, and thereupon said clerk of the City Court of Montgomery be and he is hereby directed to forthwith transmit unto this Court, under his hand and seal of said City Court of Montgomery, a transcript of the record in said suit of the County of Montgomery versus John J. Cochran and The Fidelity & Deposit Company of Maryland.

Given under my hand this 15th day of February, 1902.

THOMAS G. JONES,
Judge of the Circuit Court of the United States for the Middle District of Alabama.

Filed February 15, 1902.

J. W. DIMMICK,
Clerk.

18 PETITION OF PLAINTIFF TO REMOVE CAUSE BACK TO THE STATE COURT.

In the Circuit Court of the United States for the Middle District of Alabama.

County of Montgomery, Plaintiff,
vs.
John J. Cochran, as Principal, and The Fidelity & Deposit Company of Maryland, a Corporation under the laws of the State of Maryland, as Surety, Defendants.

Petition to remove said Cause back to the City Court of Montgomery, Alabama.

To the Honorable the Judges of the Circuit Court of the United States for the Northern and Middle Districts of Alabama:

Motion is hereby made by the plaintiff, by leave of the Court first had and obtained, in the above entitled cause, to remand said cause to the City Court of Montgomery, Alabama, on the following grounds and for the following reasons:

1. That the said Circuit Court of the United States for the Middle District of Alabama, has no jurisdiction in said cause, for the reason that John J. Cochran, who is a party defendant in said cause, as principal, is a resident citizen of Montgomery County and State of Alabama, and his co-defendant, The Fidelity and Deposit Company of Maryland, is a citizen of the State of Maryland, and that said plaintiff in the said cause of action, Montgomery County, is a citizen of the State of Alabama, and that said party defendant, said John J. Cochran, principal, was elected treasurer of Montgomery County, Alabama, and the said Fidelity and Deposit Company of Maryland were and are the sureties on his official bond, on which suit was brought in the City Court of Montgomery, to recover the penalty of said bond, to-wit: $130,000.00.

2. Because it appears from the allegations of the petition filed in this Honorable Court by one of the defendants in said cause, The Fidelity and Deposit Company of Maryland, that said corporation is a citizen of the State of Maryland, and that his co-defendant, John J. Cochran, is a citizen of the State of Alabama, and that this Court has no jurisdiction of said cause, or subject matter thereof.

19 Wherefore, plaintiff prays that an order or decree may be made and entered directing or commanding that the said cause be remanded back to the City Court of Montgomery by this Honorable Court.

JOHN G. FINLEY,
J. F. STALLINGS,
Attys. for Plaintiff.

United States of America,
Middle District of Alabama.

Before me, J. W. Dimmick, Clerk of the United States Circuit Court, personally appeared C. A. Allen, who is known to me, and who being duly sworn, deposes and says that he is clerk of the Board of Revenue of Montgomery County and authorized to make this affidavit and that all the matters and facts stated in the above motion are true according to the best of his knowledge, information and belief.

C. A. ALLEN.

Subscribed and sworn to this 6th day of March, 1902.

J. W. DIMMICK,
Clerk U. S. Cir. Ct. Mid. Dist. of Ala.

Filed March 6, 1902.

J. W. DIMMICK,
Clerk.

AMENDMENT TO MOTION TO REMAND TO CITY COURT.

In the Circuit Court of the U. S., at Montgomery, Ala.

The County of Montgomery
vs.
John J. Cochran, et al.

Amended Motion to Remand to City Ct.

Now comes the plaintiff, Montgomery County, and by leave of this Honorable Court first had and obtained, moves the Court to allow plaintiff to amend its motion heretofore filed in this cause and in this Court, by adding the following:

1. This Court has no jurisdiction in this cause.
2. That under Art. 3, Sec. 2, of the Constitution of the United States, Congress had no authority to give jurisdiction in cases of this character.

3. That the Act of Congress approved August 13th, 1888, amending the Act of March 3, 1887, did not confer jurisdiction in the Circuit Court of the United States of a cause
20 where part of the defendants were residents of the same State as the plaintiff and a part of the defendants non-residents of said State, as is hereinbefore shown to be by the motion in the case under consideration.

JOHN G. FINLEY,
J. F. STALLINGS,
Attys. for Plaintiff.

Filed June 30, 1902.

J. W. DIMMICK,
Clerk.

RENEWAL OF MOTION TO REMAND TO CITY COURT.

In the Circuit Court of the United States for the Middle District of the State of Alabama.

County of Montgomery, Plaintiff,
vs.
John J. Cochran and The Fidelity & Deposit Company of Maryland, Defendants.

Comes the plaintiff in the above entitled cause and here now renews and insists upon its motion to remand said cause to the State Court, on the ground that the defendant, Cochran, being a citizen of the State of Alabama, the same state of the plaintiff, and there being no separable controversy between the plaintiff and the other defendant, the act of 1887-88 does not authorize the removal of the cause from the State Court to the Circuit Court of the United States by the non-resident defendant on the ground of prejudice or local influence; and upon the further ground that if such is the intention of said act it is unconstitutional; and upon the further ground that the Circuit Court of the United States is without jurisdiction to try and determine said cause.

JOHN G. FINLEY,
J. F. STALLINGS,
W. L. MARTIN,
Attys. for Plaintiff.

Filed this 23rd day of May, 1903.

J. W. DIMMICK,
Clerk.

21 COMPLAINT AS ORIGINALLY FILED, OMITTING THE FOURTH COUNT THEREOF.

In the City Court of Montgomery.

The County of Montgomery
vs.
John J. Cochran, as Principal, and The Fidelity & Deposit Company of Maryland, a Corporation existing under the laws of the State of Maryland, as Surety.

The plaintiff claims of the defendant the sum of one hundred and twenty thousand dollars as damages for the breach of the condition of the official bond of John J. Cochran, the defendant, as County Treasurer of Montgomery County, Alabama, executed by the said John J. Cochran, as principal, with the Fidelity and Deposit Company of Maryland, a corporation existing under the laws of the State of Maryland, as his surety on said official bond, on the 17th day of August, 1900, and payable to the plaintiff, the said Montgomery County, Alabama, in the sum of one hundred and twenty thousand dollars, said bond approved by J. B. Gaston, Judge of Probate of Montgomery County, Alabama, on the 24th day of August, A. D. 1900, being in words and figures as follows, viz:

The State of Alabama,
Montgomery County.

Know all men by these Presents: That we, John J. Cochran, of the State and County aforesaid, and the Fidelity and Deposit Company of Maryland, a corporation of Maryland, as surety, are held and firmly bound unto the County of Montgomery in the sum of one hundred and twenty thousand dollars ($120,000.00), for the payment of which, well and truly to be made and done, we bind ourselves, our heirs, executors, administrators and assigns firmly by these presents.

"Sealed with our seals and dated this 17th day of August, 1900.

"The condition of the above obligation is such that, whereas, the above bound John J. Cochran was, on the 6th day of August, 1900, elected treasurer of Montgomery County, in and for said county. Now,if the said John J. Cochran shall faithfully discharge the duties of such office during the term he continues therein or discharges any of the duties thereof, then

22 the above obligation to be void, otherwise to remain in full force and effect.

JOHN J. COCHRAN, [L. S.]
FIDELITY & DEPOSIT COMPANY OF MARYLAND,
By R. F. MANLEY. [L. S.]
Attorney in Fact.

Approved and ordered of record, this the 24th day of August, A. D. 1900.

J. B. GASTON,
Judge Probate Court Montgomery County."
[U. S. R. stamp 1.64]

And plaintiff alleges that the said John J. Cochran was elected treasurer of Montgomery County on the 6th day of August, 1900, and qualified as required by law, and has acted as treasurer of said Montgomery County from the 24th day of August, 1900, and is now acting as such treasurer; and the plaintiff avers that the said John J. Cochran, as aforesaid, has broken the condition of his official bond in this, that the said Cochran, as treasurer as aforesaid, having possession of said sum of one hundred and thirty thousand dollars, by virtue of being treasurer of said county, made a general deposit of said sum in the banking house of F. M. Billing, doing business under the firm name of Josiah Morris & Company, in the City and County of Montgomery and State of Alabama, which said sum of money said plaintiff avers the said John J. Cochran, as such treasurer, received and collected for the plaintiff, Montgomery County. And plaintiff avers that by reason of said unlawful general deposit in the said bank as aforesaid, by said defendant, the said plaintiff has suffered loss in the sum of one hundred and thirty thousand dollars to the damage of the plaintiff as aforesaid.

2. The plaintiff, Montgomery County, claims of the defendant, John J. Cochran, the further sum of one hundred and twenty thousand dollars for the breach of the condition of the official bond of the defendant, John J. Cochran, as county treasurer of Montgomery County, said bond made by said John J. Cochran, as principal, with the Fidelity and Deposit Company of Maryland, a corporation under the laws of the State of Maryland, as his surety on his official bond, on the 17th day of August, 1900, and payable to the plaintiff, said Montgomery County, in the sum of one hundred and twenty thousand dollars, and approved by J. B. Gaston, Judge of the Probate Court of Montgomery County, Alabama, on the 24th day of August, 1900, with condition as follows, viz:

"The condition of the above obligation is such, that whereas,

23 the above bound John J. Cochran was, on the 6th day of August, 1900, elected treasurer of Montgomery County, in and for said county. Now, if the said John J. Cochran shall faithfully discharge the duties of such office during the term he continues therein, or discharges any of the duties thereof, then the above obligation to be void, otherwise to remain in full force and effect."

And plaintiff avers that John J. Cochran was elected treasurer of Montgomery County on the 6th day of August, 1900, and qualified as required by law, as aforesaid, and has acted as treasurer of Montgomery County since the 24th day of August, 1900, and is now acting as such treasurer; and plaintiff alleges that the condition of said bond has been broken by the defendant, in this, that the said John J. Cochran, as treasurer, as aforesaid, lawfully received the sum of one hundred and thirty thousand dollars, the property of the plaintiff, which it was his duty to keep safely, and that he failed to keep the same safely as he was required by law to do, but converted the same by depositing it subject to check in the banking house of F. M. Billing, doing business under the firm name of Josiah Morris & Co., in the City and County of Montgomery and State of Alabama, and that said plaintiff has suffered loss in the sum of one hundred and thirty thousand dollars, to the damage of the plaintiff as aforesaid.

3. The plaintiff claims of the defendant the further sum of one hundred and twenty thousand dollars as damages for the breach of the condition the official bond of the defendant, John J. Cochran, as county treasurer of Montgomery County, made by the said John J. Cochran, as principal, with the Fidelity & Deposit Company of Maryland, a corporation under the laws of Maryland, as his surety on his said official bond, on the 17th day of August, 1900, and payable to the plaintiff, Montgomery County, in the sum of one hundred and twenty thousand dollars, said bond approved by J. B. Gaston, Judge of the Probate Court of Montgomery County, with condition as follows, viz.:

"The condition of the above obligation is such, that whereas, the above bound John J. Cochran was, on the 6th day of August, 1900, elected treasurer of Montgomery County, Alabama, in and for said county. Now, if the said John J. Cochran shall faithfully discharge the duties of such office during the term he continues therein or discharges any of the duties thereof, then the above obligation to be void, otherwise to remain in full force and effect.

And the plaintiff avers that the said John J. Cochran was elected treasurer of Montgomery County on the 6th day of Au-

gust, 1900, and qualified as required by law, and has
24 acted as treasurer of Montgomery County from August 24th, 1900, and is still acting as such treasurer; and plaintiff further avers that said John J. Cochran, as such treasurer, has broken the condition of his official bond in this, that John J. Cochran, as treasurer as aforesaid, came into lawful possession of one hundred and thirty thousand dollars of the money of the plaintiff and deposited the same to his individual account and individual credit in the banking house of Josiah Morris & Co., in Montgomery County, Alabama, by which said conversion the amount of one hundred and thirty thousand dollars has been lost to the plaintiff, Montgomery County, to the damage of the plaintiff as aforesaid.

5. The plaintiff claims of the defendant, John J. Cochran, as principal, and the Fidelity & Deposited Company of Maryland, a corporation under the laws of the State of Maryland, as surety, the sum of one hundred and twenty thousand dollars for the breach of the condition of his official bond, made by the defendant on the 24th day of August, 1900, and payable to the plaintiff in the sum of one hundred and twenty thousand dollars, said bond approved by J. B. Gaston, Judge of the Probate Court of Montgomery County, Alabama, on the 24th day of August, 1900, with the condition as follows:

"The condition of the above oblgation is such, that whereas, the above bound John J. Cochran was, on the 6th day of August, 1900, elected treasurer of Montgomery County. Now, if the said John J. Cochran shall faithfully discharge the duties of such office during the time he continues therein or discharges any of the duties thereof, the above obligation to be void, otherwise to remain in full force and effect."

And the plaintiff avers that the said John J. Cochran was elected treasurer of Montgomery County on the 6th day of August, 1900, qualified as required by law, and has acted as treasurer of Montgomery County since the 24th day of August, 1900, and is now acting as such treasurer; that on the 1st day of September, 1900, John J. Cochran, while acting as such treasurer, duly appointed and constituted John P. Kohn his agent, deputy, or attorney in fact, under the following power of attorney:

Power of Attorney.

"State of Alabama,
Montgomery County.

I, John J. Cochran, of said county, hereby constitute and appoint John P. Kohn, of Montgomery, Alabama, my true and lawful attorney to receive and receipt for in my name all moneys coming into my possession as treasurer of the County of Mont-

gomery, Alabama, and in my name as treasurer, to pay
25 out all money required by law to be paid by me upon checks signed by the clerk of the Board of Revenue of said Montgomery County; and further to make reports, keep all books required by law to be made and kept by me as such county treasurer, and to do and perform all acts and things I might lawfully do in my own name, as such county treasurer. And I hereby ratify and confirm all acts and things that may be done by the said John P. Kohn, acting as my agent under the authority of this power, as if the same were done in person by myself.

"In witness whereof I hereunto set my hand and affix my seal, this September 1st, A. D. 1900.

JOHN J. COCHRAN, [L. S.]
As Treasurer of Montgomery Co., Ala.

Witness:
E. P. MORRISETT, [Stamp 25c.]
BIBB GRAVES."

That said power of attorney is of record in Probate office of Montgomery County, in book 46 of deeds, on page ....

That said John P. Kohn was, until the 25th day of January, 1901, an officer or employe of the banking house of Josiah Morris & Co., conducted by F. M. Billing; that under an act entitled: "An Act to authorize the Board of Revenue of Montgomery County to issue bonds of said county for an amount not to exceed one hundred thousand dollars, for the purpose of building and improving the public roads of the county upon a permanent and well considered system, and for erecting bridges in said county," approved December 13th, 1900, the Board of Revenue of said county, under authority of said act, issued, negotiated and sold, on the 8th day of January, 1901, one hundred thousand dollars of road and bonds to Josiah Morris & Co., at and for the sum of $111,109.58; that said John P. Kohn tendered to Chas. A. Allen, clerk of the Board of Revenue of said county, in payment of said bonds, a check for $111,109.58 on the bank of Josiah Morris & Co., which said check said Allen refused to accept, informing said Kohn that he must have the receipt of the county treasurer for said sum of money, that Kohn then left the office of the Board of Revenue in the courthouse and returned shortly afterwards with the following receipt and handed same to said Allen:

"State of Alabama,
Montgomery County.

No. 507. Montgomery, Ala., Jan. 8, 1901.

26 Received from Board of Revenue of County $111,-109.58, proceeds sale of $100,000.00 bonds.

$111,109.58. JOHN J. COCHRAN,
County Treasr.,
By JOHN P. KOHN, his Atty.

Office of the County Treasurer.

That said Kohn, while acting under said power of attorney, in and for said Cochran, as treasurer, did on the 8th day of January, 1901, make the following entry upon the cash book of the treasurer of Montgomery County, to-wit:

"January the 8th, 1901, Board of Rev. sale of $100,000.00 bonds, $111,109.58."

And the plaintiff alleges that the condition of said official bond has been broken by the defendant in this, that the said John J. Cochran, as such treasurer, did unlawfully and knowingly permit said John P. Kohn to make a general deposit of the money, the proceeds of the sale of said bonds, to-wit: the sum of $111,109.58 (and all other money of the County of Montgomery, amounting in the aggregate to the amount of one hundred and thirty thousand dollars), which came into his hands as treasurer aforesaid, in the private bank of F. M. Billing, doing business under the name of Josiah Morris & Company, and after said deposit the said John J. Cochran did knowingly and in violation of his official duty permit the said F. M. Billing, doing business under the name of Josiah Morris & Company, to use and convert to his own use all of the proceeds of the sale of said bonds (as well as all other money of the county) which came into his hands as treasurer aforesaid, in the amount of one hundred and twenty thousand dollars, to the damage of the plaintiff as above stated.

JOHN G. FINLEY,
J. F. STALLINGS,
Attys. for Plaintiff.

Filed in office this 21st day of January, 1902.

H. H. MATTHEWS,
Clerk.

27 AMENDED COMPLAINT.

In the Circuit Court of the United States for the Middle District of Alabama.

County of Montgomery, Plaintiff,
vs.
John J. Cochran and The Fidelity & Deposit Company of Maryland, Defendants.

The plaintiff in the above entitled cause, by leave of the Court first had and obtained, amends its complaint in said cause as follows:

The fourth count of the complaint is stricken out.

The words "and all other money of the County of Montgomery, amounting in the aggregate to the amount of one hundred and thirty thousand dollars," in the latter part of the fifth count of said complaint are stricken out.

And by adding to the complaint the following additional counts to be numbered, respectively, 6, 7, and 8.

6. The plaintiff claims of the defendant the further sum of one hundred and twenty thousand dollars for the breach of the condition of an official bond made by the defendant on the 24th day of August, 1900, and payable to the plaintiff in the sum of one hundred and twenty thousand dollars, approved by the Judge of Probate of Montgomery County, Alabama, on the 24th day of August, 1900, with condition as follows: "The condition of the above obligation is such, that whereas, the above bound John J. Cochran was, on the 6th day of August, 1900, elected treasurer of Montgomery County. Now, if the said John J. Cochran shall faithfully discharge the duties of such office during the time he continued therein or discharge any of the duties thereof, the above obligation to be void, otherwise to remain in full force and effect."

And plaintiff avers that said John J. Cochran was elected treasurer of Montgomery County on the 6th day of August, 1900; that he qualified as required by law, and has acted as treasurer of Montgomery County since the 24th day of August, 1900, and is now acting as such treasurer; that on the 1st day of September, 1900, said John J. Cochran, while acting as such treasurer, duly appointed and constituted John P. Kohn deputy or attorney in fact, under the following power of attorney:

28 "State of Alabama,
Montgomery County.

Power of Attorney.

I, John J. Cochran, of said county, hereby constitute and appoint John P. Kohn, of Montgomery, Alabama, my true and lawful attorney to receive and receipt for in my name all moneys coming into my possession as treasurer of the County of Montgomery, Alabama, and in my name as treasurer, to pay out all moneys required by law to be paid by me upon checks signed by the clerk of the Board of Revenue of said Montgomery County; and further to make reports, keep all books required by law to be made or kept by me as such county treasurer, and to do and perform all acts and things I might lawfully do in my name, as such county treasurer. And I hereby ratify and confirm all the acts and things that may be done by the said John P. Kohn acting as my agent under the authority of this power, as if the same were done in person by myself.

In witness whereof, I hereunto set my hand and affix my seal, this September 1st, A. D. 1900.

JOHN J. COCHRAN, [L. S.]
As Treasurer of Montgomery Co., Ala.

Witness:
E. P. MORRISETT, [Stamp 25c.]
BIBB GRAVES."

That said John P. Kohn was, at and prior to the date of said power of attorney, and at all times thereafter up to the 25th day of January, 1901, an employe of the banking house of Josiah Morris & Company, conducted by F. M. Billing, and from the beginning of said Cochran's term of office as such county treasurer, September 1, 1900, to January 25th, 1901, said Kohn, under said power of attorney, kept the books and accounts of said county treasurer at his, said Kohn's, place of business in said banking house of Josiah Morris & Company, received and paid out money and performed generally the duties of said county treasurer; that under an act entitled, "An Act to authorize the Board of Revenue of Montgomery County to issue bonds of said county for an amount not to exceed one hundred thousand dollars, for the purpose of building and improving the public roads of the county upon a permanent and well considered system, and for erecting bridges in said county," approved December 13th, 1900, said Board of Revenue issued and sold, on January

29 8, 1901, one hundred thousand dollars of the bonds of the County of Montgomery, to Josiah Morris & Company, at and for the sum of $111,109.58; that whilst said bonds were being signed by the proper officers and before the delivery thereof to said Josiah Morris & Company, said Kohn offered Chas. A. Allen, as clerk of the Board of Revenue, a check or demand note, dated January 8, 1901, drawn by said Josiah Morris & Company, in favor of said Cochran, as county treasurer, on said Josiah Morris & Company, for the sum of $111,109.58, which said check or demand note said Allen declined to receive, whereupon said Kohn left the office of said Allen, which was in the courthouse of the County of Montgomery, and soon thereafter and upon the same day, returned to the office of said Allen and (informed said Allen that said sum had been paid to said treasurer and) handed to said Allen the written receipt of said treasurer for said sum of money; and thereupon, and upon the faith of said (representation that said money had been paid) said Allen, acting for said Board of Revenue, delivered said bonds to said Josiah Morris & Company and the same were by Josiah Morris & Company immediately disposed of and placed beyond the reach of the plaintiff and the said bonds are now outstanding against the plaintiff.

And plaintiff avers that the condition of said bond has been broken in this: That the said John J. Cochran, as such treasurer, by and through his said deputy, Kohn, as aforesaid, did pretend and represent to said Allen, as clerk of said Board of Revenue, that the said sum of $111,109.58, the purchase price of said bonds, had been paid to him, said treasurer, and by reason of such pretense and representation caused said Allen, acting for said Board of Revenue, to deliver said bonds to said Josiah Morris & Company and to incur the obligation thereof as aforesaid, when in truth and in fact no part of said money had been paid to said treasurer and no part thereof has been paid to plaintiff; wherefore plaintiff claims damages in said sum of one hundred and twenty thousand dollars.

7. The plaintiff claims of the defendant the further sum of one hundred and twenty thousand dollars for the breach of the condition of an official bond made by the defendants on the 24th day of August, 1900, and payable to the plaintiff in the sum of one hundred and twenty thousand dollars, approved by the Judge of Probate of Montgomery County, Alabama, on the 24th day of August, 1900, with condition as follows:

The condition of the above obligation is such, that whereas, the above bound John J. Cochran was, on the 6th day of August, 1900, elected treasurer of Montgomery County. Now, if

the said John J. Cochran shall faithfully discharge the
30 duties of such office during the time he continues therein or discharges any of the duties thereof, the above obligation to be void; otherwise to remain in full force and effect."

And plaintiff avers that said John J. Cochran was elected treasurer of Montgomery County on the 6th day of August, 1900; that he qualified as required by law, and has acted as treasurer of Montgomery County since the first day of September, 1900, and is now acting as such treasurer; that on the first day of September, 1900, said John J. Cochran, while acting as such treasurer, duly appointed and constituted John P. Kohn his agent, deputy or attorney in fact, under the following power of attorney:

"State of Alabama,
Montgomery County.

Power of Attorney.

I, John J. Cochran, of said county, hereby constitute and appoint John P. Kohn, of Montgomery, Alabama, my true and lawful attorney to receive and receipt for in my name all moneys coming into my possession as treasurer of the County of Montgomery, Alabama, and in my name as treasurer, to pay out all moneys required by law to be paid by me upon checks signed by the clerk of the Board of Revenue of said Montgomery County; and further to make reports, keep all books required by law to be made or kept by me as such county treasurer, and to do and perform all acts and things I might lawfully do in my own name, as such county treasurer. And I hereby ratify and confirm all the acts and things that may be done by the said John P. Kohn acting as my agent under the authority of this power, as if the same were done in person by myself.

In witness whereof, I hereunto set my hand and affix my seal, this September 1st, A. D. 1900.

JOHN J. COCHRAN, [L. S.]
As Treasurer of Montgomery Co., Ala.

Witness:
E. P. MORRISETT, [Stamp 25c.]
BIBB GRAVES."

That said John P. Kohn was, at and prior to the date of said power of attorney, and at all times thereafter up to the 25th day of January, 1901, an employe of the banking house of Josiah Morris & Company, conducted by F. M. Billing, and from the beginning of said Cochran's term of office as such county treas-

urer, September 1, 1900, to January 25th, 1901, said Kohn, under said power of attorney, kept the books and ac-
31 counts of said treasurer, at his, Kohn's, place of business in said banking house, received and paid out money and performed generally the duties of said county treasurer; that at and prior to the execution of said official bond it was understood and agreed between said Cochran and said Billing that said Cochran should appoint said Kohn his deputy and that the money of the plaintiff coming to said Cochran's possession by virtue of his office should be deposited in said banking house, to the credit and subject to check of said Cochran, as such treasurer, by his said deputy, all of which was well known to the defendants at the time of the execution of said bond; and said Kohn accordingly, in the name of said treasurer, received and receipted for various sums of money and deposited the same to the credit of said treasurer in said bank and drew checks thereon in favor of the holders of warrants drawn by the clerk of the board of revenue, for the several amounts thereof, all of which was well known to the defendants at and prior to the 8th day of January, 1901; that under an act entitled "An act to authorize the board of revenue of Montgomery County to issue bonds of said county for an amount not to exceed one hundred thousand dollars, for the purpose of building and improving the public roads of the county upon a permanent and well considered system, and for erecting bridges in said county," approved December 8, 1901, said board of revenue issued one hundred thousand dollars of said bonds of the County of Montgomery to Josiah Moris & Company, at and for the sum of $111,109.58; that whilst said bonds were being signed by the proper officers and before the delivery thereof to said Josiah Morris & Company, said Kohn offered to Chas. A. Allen, as clerk of the board of revenue, a check or demand note, dated January 8, 1901, drawn by said Josiah Morris & Company, for the sum of $111,109.58, which said check or demand note said Allen declined to receive, whereupon said Kohn left the office of said Allen, which was in the courthouse of the County of Montgomery, and soon thereafter and upon the same day returned to the office of said Allen and informed said Allen that said sum had been paid to said treasurer and handed to said Allen the written receipt of said treasurer for said sum of money; and thereupon, and upon the faith of said representation that said money had been paid, said Allen, acting for said board of revenue, delivered said bonds to said Josiah Morris & Company, and the same were by said Josiah Morris & Company immediately disposed of and placed beyond the reach of the plaintiff, and said bonds are now outstanding against plaintiff.

32 And plaintiff avers that on said 8th day of January, 1901, said treasurer, Cochran, by and through his said deputy, Kohn, made an entry upon the books of said treasurer, being a book which the said treasurer was by law required to keep, charging said treasurer, Cochran, with said sum of $111,109.58, as the proceeds of said sale of said $100,000.00 bonds, said entry on said books being in substance as follows:

Jany. 8, 1901. Board of revenue sale of $100,000.00 bonds, $111,109.58.

And at the same time, said treasurer by and through his said deputy as aforesaid, surrendered to said Josiah Morris & Company said check or demand note and took a credit thereof on his pass book, as such treasurer, as a general deposit by him, as such treasurer, of said sum, in said bank.

And plaintiff avers that after said January 8, 1901, and prior to January 25, 1901, with full knowledge of the facts touching the sale of said bonds, the receipt executed for the price thereof and of said book entries, paid, sundry checks or warrants drawn upon said fund by the clerk of the board of revenue of Montgomery County, amounting in the aggregate to, to-wit: $6517.00 and made no objection against the acts of his said deputy, Kohn, to said board of revenue, until after the said banking house had failed and suspended business which failure and suspension occurred on, to-wit: the 25th day of January, 1901.

And plaintiff avers that the condition of said bond has been broken in this: That the said John J. Cochran did, unlawfully and knowingly, permit the said John P. Kohn to make a general deposit of said money, the proceeds of the sale of said bonds, to-wit: $111,109.58, in the bank of said Josiah Morris & Company, whereby said sum was lost to plaintiff, to the damage of plaintiff, as above stated.

8. The plaintiff claims of the defendants the further sum of one hundred and twenty thousand dollars for the breach of the condition of an official bond made by the defendants on the 24th day of August, 1900, and payable to the plaintiff in the sum of one hundred and twenty thousand dollars, approved by the Judge of Probate of Montgomery County, Alabama, on the 24th day of August, 1900, with condition as follows: "The condition of the above obligation is such, that whereas, the above bound, John J. Cochran, was on the 6th day of August, 1900, elected treasurer of Montgomery County. Now, if the said John J. Cochran shall faithfully discharge the duties of such office during the time he continues therein or discharges

any of the duties thereof, the above obligation to be void, otherwise to remain in full force and effect."

33 And plaintiff avers that John J. Cochran was elected treasurer of Montgomery County on the 6th day of August, 1900; that he qualified as required by law, and has acted as treasurer of Montgomery County since the 24th day of August, 1900, and is now acting as such treasurer; that on the 1st day of September, 1900, said John J. Cochran, while acting as such treasurer, duly appointed and constituted John P. Kohn, deputy, or attorney in fact, under the following power of attorney:

"State of Alabama,
Montgomery County.

Power of Attorney.

I, John P. Kohn, of said county, hereby constitute and appoint John P. Kohn, of Montgomery, Alabama, my true and lawful attorney, to receive and receipt for in my name moneys coming into my possession as treasurer of the County of Montgomery, Alabama, and in my name as treasurer, to pay out all moneys required by law to be paid by me upon checks signed by the clerk of the board of revenue of said Montgomery County; and further to make reports, keep all books required by law to be made or kept by me as such county treasurer, and to do and perform all acts and things I might lawfully do in my name as such county treasurer. And I hereby ratify and confirm all the acts and things that may be done by the said John P. Kohn, acting as my agent under the authority of this power, as if the same were done in person by myself.

In witness whereof I hereunto set my hand and affix my seal, this September 1st, A. D. 1900.

JOHN J. COCHRAN, [L. S.]
As Treasurer of Montgomery Co., Ala.

Witness:
E. P. MORRISETTE.
BIBB GRAVES." (Stamp 50c.)

That said John P. Kohn was, at and prior to the date of said power of attorney and at all times thereafter up to the 25th day of January, 1901, an employe of the banking house of Josiah Morris & Company, conducted by F. M. Billing, and from the beginning of said Cochran's term of office as such county treasurer, September 1, 1900, to January 25th, 1901, said Kohn, under said power of attorney, kept the books and accounts of said county treasurer at his, Kohn's, place of busi-

ness in said banking house of Josiah Morris & Company, received and paid out money and performed generally the duties of said county treasurer; that under the act, entitled, "An act to authorize the board of revenue of Montgomery County to issue bonds of said county for an amount not to exceed one hundred thousand dollars, for the purpose of building and improving the public roads of the county upon a permanent and well considered system and for erecting bridges in said county," approved December 13th, 1900, said board of revenue issued and sold on January 8, 1901, one hundred thousand dollars of the bonds of the County of Montgomery, to Josiah Morris & Company, at and for the sum of $111,109.58; that whilst said bonds were being signed by the proper officers and before the delivery thereof to said Josiah Morris & Company, said Kohn offered to said Chas. A. Allen, as clerk of the board of revenue, a check or demand note, dated January 8, 1901, drawn by said Josiah Morris & Company, in favor of said Cochran, as county treasurer, on said Josiah Morris & Company, for the sum of $111,109.58, which said check or demand note said Allen declined to receive, whereupon said Kohn left the office of said Allen, which was in the courthouse of the County of Montgomery, and soon thereafter and upon the same day returned to the office of said Allen, and informed said Allen that said sum had been paid to said treasurer and handed to said Allen the written receipt of said treasurer for said sum of money; and thereupon, and upon the faith of said representation that said money had been paid, said Allen, acting for said board of revenue, delivered said bonds to said Josiah Morris & Company, and the same were by said Josiah Morris & Company immediately disposed of and placed beyond the reach of the plaintiff, and said bonds are now outstanding against the plaintiff.

34

And plaintiff avers that the condition of said bond has been broken in this: That the said John J. Cochran, as such treasurer, by and through his deputy, Kohn, as aforesaid, did undertake to collect and receive said sum of $111,109.58, the purchase money price of said bonds, as aforesaid, and wrongfully and knowingly failed to collect and receive said sum, to the damage of the plaintiff as aforesaid.

JOHN G. FINLEY,
JESSE F. STALLINGS,
W. L. MARTIN,
Attys. for Plff.

Filed by leave of the Court this 23rd day of May, 1903.

J. W. DIMMICK,
Clerk.

35 DEMURRER OF JOHN J. COCHRAN TO THE COMPLAINT AS AMENDED.

In the Circuit Court of the United States for the Middle District of Alabama.

County of Montgomery
vs.
Fidelity & Deposit Company of Maryland and Jno. J. Cochran.

Demurrer to the Complaint.

Comes John J. Cochran, one of the defendants in the above stated cause, and separately demurs to each count of the complaint and as grounds of demurrer assigns the follows:

1. There is no cause of action against this defendant stated in said count.
2. No breach of the bond sued upon is stated in said count.
3. That no right of action is [in] favor of or running to the plaintiff is stated in said count.
4. It is not shown by said count that the plaintiff has suffered any injury by any breach of said bond sued upon.
5. Said Jno. J. Cochran, as county treasurer of Montgomery County, is made by law custodian of the funds sought to be recovered herein, and no reason is shown why there should be a recovery of the said funds, or the value thereof, in favor of plaintiff and no right in the plaintiff to recover said funds is shown by said count.
6. It appears in and by the said count that the said John J. Cochran is the treasurer of the said County of Montgomery and as such is entitled to retain the custody of all the funds of the plaintiff.
7. It is not averred or shown by said count that it has ever become the duty of said Cochran, as county treasurer, to pay to plaintiff or any one else any part of the funds sought to be recovered in said count or any amount on account thereof.
8. It is averred as a conclusion of the pleader that the plaintiff has lost said money by reason of said deposit in said bank and no facts are averred in support of said conclusion.
9. It is not averred or shown that any demand has been made upon the said Cochran in the manner provided by law for the payment of said money, or any part thereof, before the bringing of this suit.
10. The said Cochran is entitled to the possession of said

36 money and is required by law to pay it out upon warrant or warrants properly and legally drawn, and it is not averred or shown that any warrant has been drawn upon him for the payment of any of said money or that he has failed to pay any warrant so drawn upon him as such treasurer.

11. It is not averred or shown whether such deposit was made before or after the execution of the bond sued on.

12. It is averred that the said Cochran deposited the money of the plaintiff in said bank; but for aught that appears in said count, the said Cochran may have drawn said money from the said bank in payment of warrants legally drawn on him as said treasurer.

13. It appears that the said Kohn was acting in a dual capacity, viz: agent of Josiah Morris & Co. and deputy of Cochran, and it does not appear that said Cochran had any notice, knowledge or information that the said Kohn was so acting or had so acted.

This defendant assigns as additional grounds of demurrer to the fifth count of the complaint the following:

1. That it appears from said count that John P. Kohn was not the agent, deputy or attorney in fact of said John J. Cochran, because the power of attorney set forth in said count is illegal and against public policy.

2. That it appears from said count that John P. Kohn was not the agent, deputy or attorney in fact of said John J. Cochran, because the power of attorney set forth in said count is illegal and against public policy, and that the said power of attorney is not given to the said Kohn for the performance of some special act or by reason of any special emergency for and instead of the treasurer, but is substantially a surrender by the treasurer to the said Kohn of the exercise of the functions of his office.

3. It is against public policy for the said Cochran to appoint the said Kohn to perform all of the duties of the office of treasurer and said power of attorney for said reason was void.

4. That the appointment of a deputy or attorney in fact or agent by a county treasurer is not authorized by any law of the State of Alabama.

5. It was contrary to the law of Alabama for the said Cochran, as county treasurer, to appoint said Kohn as his agent, attorney in fact or deputy to transact the duties of treasurer of Montgomery County.

6. It does not appear from the said count that this defendand agreed or contracted to be responsible for the acts of any deputy of said Cochran, as treasurer.

37 7. It is alleged that Kohn had the right to receive and receipt for money, but it is not alleged that Kohn had the right to receipt for anything except money.

8. It is alleged that Kohn was authorized to do all the acts that Cochran could do lawfully, but it is not alleged that Kohn was authorized to do unlawful acts.

9. It does not appear that said Kohn or Cochran received any money of the plaintiff.

10. It does not appear that said Cochran or Kohn received any money of the plaintiff from the board of revenue.

11. It appears from said count that neither the said Kohn nor Cochran ever received any money from said board of revenue.

12. It does not appear that Kohn had any authority to receive or receipt for anything except money in the name of said Cochran.

13. It is not alleged that any money was ever paid for said bonds.

14. It is not alleged that said Cochran knew anything of the action of said Kohn in giving said receipt without receiving the money mentioned therein.

15. It does not appear that said Cochran authorized said Kohn to make entry on the books of the county treasurer of money received when none had been received.

16. It is not alleged that said Cochran knew anything of said entry upon said treasurers' books or that he authorized said Kohn to make it.

17. Entry upon the books of said Cochran by said Kohn of the receipt of money where no money was in fact received did not bind said Cochran.

18. It is alleged that Kohn could only do what Cochran could lawfully do, and that Kohn issued in the name of Cochran a receipt to said board of revenue as though he had received one hundred eleven thousand, one hundred and nine and 58-100 $(111,109.58) dollars, when he had not received it, and it is not alleged that Cochran could lawfully have issued any such receipt so as to bind him.

19. It is shown in said count that Cochran authorized Kohn to receipt for only such money as came into the possession of Cochran, and it is not alleged that any money was received, but only the prommissory note of Josiah Morris & Company.

20. It is alleged in said count that Kohn, as the agent of Josiah Morris & Co., tendered to said Allen a check on the bank of Josiah Morris & Co., but it is not alleged whose name was signed to said check.

21. It is not alleged that Cochran ever had any knowledge

or information that said Kohn had received said check
38 as money.

As demurrer to the sixth count this defendant assigns the following grounds, to-wit:

1. The first, second, third, fourth, fifth and sixth grounds of demurrer assigned to counts 1, 2, 3 and 5, separately.

2. The first, second, third, fourth, ninth, tenth and ..... grounds of demurrer assigned to the fifth count.

3. It is alleged in and by the said count that the bonds mentioned therein were sold by the authority of an act of the legislature mentioned therein, which act of the legislature made the treasurer and his surety liable for the proceeds of said bonds when received by him; and it is alleged in said count that no money was ever received by said treasurer or his deputy as the proceeds of said bonds.

4. It appears in and by said count that Kohn, deputy to said Cochran, represented to the board of revenue of plaintiff that he had received pay for said bonds, when, in fact, he had not, and it does not appear that this defendant as said treasurer is by law made responsible for said misrepresentation or the loss occasioned thereby.

5. It appears in and by said count that said Kohn represented to the board of revenue of plaintiff that he had received payment of said check or demand note, when, in fact, he had not; and it is not alleged that said representation was made by the said Cochran himself or made by said Kohn by authority of said Cochran or with the knowledge or consent of said Cochran.

6. Under the special act under which said bonds were issued, the said Cochran as treasurer is not responsible for misrepresentations made or loss occasioned by misrepresentations made, as alleged in said count.

7. It appears that by the laws of Alabama the duty of the treasurer was to receive and safely keep, in accordance with the laws, money of the county; and that no duty rested upon him as to money not received by him, and it is alleged in said count that no money was received by said Cochran or by the said Kohn as his deputy.

8. The special act of the legislature under which the said bonds were issued made it the duty of the said Cochran only to safely keep all of the proceeds accruing from the sale of said bonds which might come into his hands in his official capacity, the same as other county funds or money in his hands as such treasurer, and no duty rested upon the said Cochran under the said act as to money not received by him; and it is

alleged in said count that no money was received by the said Cochran or by Kohn, his deputy.

9. It does not appear that said Kohn was authorized in said power of attorney by the said Cochran to do anything
39 which the said Cochran could not lawfully do as treasurer, and it is alleged in said count that the said Kohn did do something which the said Cochran could not lawfully do as treasurer.

10. The special act under which the bonds were issued mentioned in said count made it the duty of the board of revenue of plaintiff to receive the money upon the sale of said bonds and to pay the same to said Cochran; and it appears in and by said count that said board of revenue did not receive the money for said bonds and did not pay it to the said Cochran as treasurer, and it also appears that neither said Cochran nor said Kohn ever received any money for said bonds.

And this defendant demurs to the seventh count and assigns the following grounds, to wit:

1. Each and every ground of demurrer assigned to the sixth count.

2. It is alleged that an entry was made upon the books of said treasurer Cochran acknowledging receipt of said process of said bonds, but it is not alleged that said treasurer or said Kohn in fact received said proceeds or any part of said proceeds.

3. It appears in and by said count that said Kohn committed an unlawful act in misappropriating the funds of the plaintiff by the surrender to said Josiah Morris & Co., of said check or demand note and taking credit therefor on the pass book of the treasurer as a general deposit and no right of action inured to the plaintiff by and through said unlawful act.

4. It is alleged in said count that said Cochran, in full knowledge of the facts touching the sale of said bonds, and of said receipt executed, and of said entries made upon the books, paid sundry checks and warrants out of said alleged proceeds of said bonds without objecting to the acts of said deputy, Kohn; but it also appears that said general deposit in said bank, if the matters alleged in said count be held to be a general deposit of the funds of said county, was a conversion of said funds and an unlawful act and no cause of action inures to the plaintiff from said unlawful act.

5. It appears in and by the allegations of said count that Cochran, through his deputy, misappropriated the funds of the plaintiff by depositing them in bank in a general deposit and the plaintiff has no right to ratify said illegal act and to base his cause of action thereon.

6. It is difficult to determine upon what breach of the bond plaintiff has attempted to proceed in said count—
40 whether upon said alleged misrepresentation by which said bonds were parted with, whether by the entry made by said Kohn upon the books of said treasurer or upon the ratification of the acts of the deputy by Cochran or upon the alleged conversion of the funds of the county or upon the alleged permission of said Cochran to said Kohn to convert the funds of the plaintiff.

7. It does not appear from the said count that any loss resulted to the plaintiff from the matters set up and by way of estoppel in the said count.

This defendant demurs to the eighth count, and as grounds of demurrer assigns the following, to wit:

1. Each and every ground of demurrer urged to the seventh count.

2. This defendant is not responsible for the failure of his deputy, Kohn, to collect the amount of the said check or demand note.

3. The only obligation resting upon this defendant was that the treasurer should safely keep the money after he received it

4. By the terms of the act under which said bonds were issued no duty was placed upon the said Cochran as treasurer to collect the proceeds of said bonds; and this defendant is re-responsible only for the failure of the said Cochran to perform those duties with reference to said proceeds of the bonds fixed on him by the terms of said special act.

5. The duties of the said Cochran as treasurer in relation to the proceeds of said bonds were different from the duties imposed upon said Cochran as treasurer in reference to the general funds of said county and this defendant is responsible only for the failure of the said Cochran to perform those duties fixed by the act under which the said bonds were issued.

HILL & HILL.
Attys. for Jno. J. Cochran.

We hereby certify that in our opinion the foregoing demurrer is well taken.

HILL & HILL,
Attys. for Jno. J. Cochran.

Before me, J. W. Dimmick, Clerk of the Circuit Court of the United States for the Middle District of Ala. personally appeared John J. Cochran, who is known to me, and who has been duly sworn under oath, deposeth and says the foregoing demurrer is not interposed for delay.

JNO. J. COCHRAN.

Sworn to and subscribed this the 23rd day of May, 1903.

41 J. W. DIMMICK, Clerk.

Filed May 23, 1903. J. W. DIMMICK, Clerk.

DEMURRER OF FIDELITY & DEPOSIT COMPANY TO COMPLAINT AS AMENDED.

In the Circuit Court of the United States for the Middle District of Alabama.

County of Montgomery
vs.
Fidelity & Deposit Company of Maryland and Jno. J. Cochran.

Demurrer to the Complaint.

Comes the Fidelity & Deposit Company of Maryland, one of the defendants in the above stated cause, and separately demurs to each count of the complaint, and as grounds of demurrer assigns the following:

1. There is no cause of action against this defendant stated in said count.
2. No breach of the bond sued upon is stated in said count.
3. That no right of action in favor of or running to the plaintiff is stated in said count.
4. It is not shown by said count that the plaintiff has suffered any injury by any breach of said bond sued upon.
5. Said Jno. J. Cochran as county treasurer of Montgomery County is made by law custodian of the funds sought to be recovered herein, and no reason is shown why there should be a recovery of the said funds, or the value thereof, in favor of plaintiff, and no right in the plaintiff to recover said funds is shown by said count.
6. It appears in and by the said count that the said John J. Cochran is the treasurer of the said County of Montgomery and as such is entitled to retain the custody of all the funds of the plaintiff.
7. It is not averred or shown by said count that it has ever become the duty of said Cochran as county treasurer to pay to plaintiff or any one else any part of the funds sought to be recovered in said count or any amount on account thereof
8 It is averred as a conclusion of the pleader that the plain-

tiff has lost said money by a reason of said deposit in said bank and no facts are averred in support of said conclusion.

9. It is not averred or shown that any demand has been made upon the said Cochran in the manner provided
42 by law for the payment of said money or any part thereof before the bringing of this suit,

10. The said Cochran is entitled to the possession of said money and is required by law to pay it out upon warrant or warrants properly and legally drawn, and it is not averred or shown that any warrant has been drawn upon him for the payment of any of said money or that he has failed to pay any warrant so drawn upon him as such treasurer.

11. It is not averred or shown whether such deposit was made before or after the execution of the bond sued on.

12. It is averred that the said Cochran deposited the money of the plaintiff in said bank but for aught that appears in said count, the said Cochran may have drawn said money from the said bank in payment of warrants legally drawn on him as said treasurer.

13. It does not appear that this defendant ever agreed to be responsible for the acts of any deputy of Cochran.

14. It appears that the said Kohn was acting in a dual capacity, viz: agent of Josiah Morris & Co. and deputy of Cochran, and it does not appear that the said Cochran had any notice, knowledge or information that the said Kohn was so acting or had so acted.

This defendant assigns as additional grounds of demurrer to the fifth count of the complaint the following:

1. That it appears from said count that John P. Kohn was not the agent, deputy or attorney in fact of said John J. Cochran, because the power of attorney set forth in said count is illegal and against public policy.

2. That it appears from said count that John P. Kohn was not the agent, deputy or attorney in fact of said John J. Cochran, because the power of attorney set forth in said count is illegal and against public policy, and that the said power of attorney is not given to the said Kohn for the performance of some special act or by reason of any special emergency for and instead of the treasurer, but is substantially a surrender by the treasurer to the said Kohn of the exercise of the functions of his office.

3. It is against public policy for the said Cochran to appoint the said Kohn to perform all of the duties of the office of treasurer and said power of attorney for said reason was void.

4. That the appointment of a deputy or attorney
43 in fact or agent by a county treasurer is not authorized by any law of the State of Alabama.

5. It was contrary to the law of Alabama for the said Cochran as county treasurer to appoint said Kohn as his agent, attorney in fact or deputy to transact the duties of treasurer of Montgomery County.

6. It does not appear from the said count that this defendant agreed or contracted to be responsible for the acts of any deputy of said Cochran as treasurer.

7. It is alleged that Kohn had the right to receive and receipt for money, but it is not alleged that Kohn had the right to receipt for anything except money.

8. It is alleged that Kohn was authorized to do all the acts that Cochran could do lawfully, but it is not alleged that Kohn was authorized to do unlawful acts.

9. It does not appear that said Kohn or Cochran received any money of the plaintiff.

10. It does not apppear that said Cochran or Kohn received any money of the plaintiff from the board of revenue.

11. It appears from said count that neither the said Kohn nor Cochran ever received any money from said board of revenue.

12. It does not appear that Kohn had any authority to receive or receipt for anything except money in the name of said Cochran.

13. It is not alleged that any money was ever paid for said bonds.

14. It is not alleged that said Cochran knew anything of the actions of said Kohn in giving said receipt without receiving the money mentioned therein.

15. It does not appear that said Cochran authorized said Kohn to make entry on the books of the county treasurer of money received when none had been received.

16. It is not alleged that said Cochran knew anything of said entry upon said treasurer's books or that he authorized said Kohn to make it.

17. Entry upon the books of said Cochran by said Kohn of the receipt of money where no money was in fact received did not bind said Cochran or this defendant.

18. It is alleged that Kohn could only do what Cochran could lawfully do, and that Kohn issued in the name of Cochran a receipt to said board of revenue as though he had received one hundred eleven thousand one hundred and nine and 58-100 ($111,109.58) dollars, when he had not received it, and it is not

alleged that Cochran could lawfully have issued any such receipt as to bind his surety.

19. It is shown in said count that Cochran authorized
44 Kohn to receipt for only such money as came into the possession of Cochran, and it is not alleged that any money was received, but only the promissory note of Josiah Morris & Company.

20. It is alleged in said count that Kohn, as the agent of Josiah Morris & Co., tendered to said Allen a check on the bank of Josiah Morris & Co., but it is not alleged whose name was signed to said check.

21. It is not alleged that Cochran ever had any knowledge or information that said Kohn had received said check as money.

As demurrer to the sixth count, this defendant assigns the following grounds, to wit:

1. The first, second, third, fourth, fifth and sixth grounds of demurrer assigned to counts 1, 2, 3, and 5, separately.

2. The first, second, third, fourth, ninth, tenth and .. .. grounds of demurrer assigned to the fifth count.

3. It is alleged in and by the said count that the bonds mentioned therein were sold by the authority of an act of the legislature mentioned therein, which act of the legislature made the treasurer and his surety liable for the proceeds of said bonds when received by him; and it is alleged in said count that no money was ever received by said treasurer or his deputy as the proceeds of said bonds.

4. It appears in and by said count that Kohn, deputy to said Cochran, represented to the board of revenue of plaintiff that he had received pay for said bonds, when, in fact, he had not, and it does not appear that the surety of said treasurer is by law made responsible for said misrepresentation or the loss occasioned thereby.

5. It appears in and by said count that said Kohn represented to the board of revenue of plaintiff that he had received payment of said check or demand note, when, in fact, he had not; and it is not alleged that said representation was made by the said Cochran himself or made by said Kohn by authority of said Cochran or with the knowledge or consent of said Cochran.

6. Under the special act under which said bonds were issued, the surety of the treasurer is not responsible for misrepresentations made or loss occasioned by misrepresentations made, as alleged in said count.

7. It appears that by the laws of Alabama the duty of the treasurer was to receive, and safely keep, in accordance with

the laws, money of the county; and that no duty rested upon him as to money not received by him, and it is alleged in said count that no money was received by said Cochran or by the said Kohn as his deputy.

8. The special act of the legislature under which the said bonds were issued made it the duty of the said
45 Cochran only to safely keep all of the proceeds accruing from the sale of said bonds which might come into his hands in his official capacity, the same as other county funds or money in his hands as such treasurer, and no duty rested upon the said Cochran under the said act as to money not received by him; and it is alleged in said count that no money was received by the said Cochran or by Kohn, his deputy.

9. It does not appear that said Kohn was authorized in said power of attorney by the said Cochran to do anything which the said Cochran could not lawfully do as treasurer, and it is alleged in said count that the said Kohn did do something which the said Cochran could not lawfully do as treasurer.

10. The special act under which the bonds were issued mentioned in said count made it the duty of the board of revenue of plaintiff to receive the money upon the sale of said bonds and to pay the same to said Cochran; and it appears in and by said count that said board of revenue did not receive the money for said bonds and did not pay it to the said Cochran as treasurer, and it also appears that neither said Cochran nor said Kohn ever received any money for said bonds.

And this defendant demurs to the seventh count and assigns the following grounds, to wit :

1. Each and every ground of demurrer assigned to the sixth count.

2. It is alleged that an entry was made upon the books of said treasurer, Cochran, acknowledging receipt of said proceeds of said bonds, but it is not alleged that said treasurer or said Kohn in fact received said proceeds or any part of said proceeds.

3. It appears in and by said count that said Kohn committed an unlawful act in misappropriating the funds of the plaintiff by the surrender to said Josiah Morris & Co. of said check or demand note and taking credit therefor on the pass book of the treasurer as a general deposit, and no right of action inured to the plaintiff by and through said unlawful act.

4. It is alleged in said count that said Cochran, in full knowledge of the facts touching the sale of said bonds, and of said receipt executed, and of said entries made upon the books, paid sundry checks and warrants out of said alleged proceeds of said bonds without objecting to the acts of said deputy, Kohn;

but it also appears that said general deposit in said bank, if the matters alleged in said count be held to be a general deposit of the funds of said county, was a conversion of said funds and an unlawful act and no cause of action inures to
46 the plaintiff from said unlawful act.

5. It appears in and by the allegations of said count that Cochran, through his deputy, misappropriated the funds of the plaintiff by depositing them in bank in a general deposit and the plaintiff has no right to ratify said illegal act and to base his cause of action thereon.

6. It is difficult to determine upon what breach of the bond plaintiff has attempted to proceed in said count—whether upon said alleged misrepresentation by which said bonds were parted with, whether by the entry made by said Kohn upon the books of said treasurer or upon the ratification of the acts of the deputy by Cochran or upon the alleged conversion of the funds of the county or upon the alleged permission of said Cochran to said Kohn to convert the funds of the plaintiff.

7. It does not appear from the said count that any loss resulted to the plaintiff from the matters set up by way of estoppel in the said count.

This defendant demurs to the eighth count, and as grounds of demurrer assigns the following, to wit :

1. Each and every ground of demurrer urged to the seventh count.

2. This defendant is not responsible as surety for the failure of the said Cochran and the failure of his deputy, Kohn, to collect the amount of the said check or demand note.

3. The only obligation resting upon this defendant was that the treasurer should safely keep the money after he received it.

4. By the terms of the act under which said bonds were issued, no duty was placed upon the said Cochran as treasurer to collect the proceeds of said bonds; and this defendant is responsible only for the failure of the said Cochran to perform those duties with reference to said proceeds of the bonds fixed on him by the terms of said special act.

5. The duties of the said Cochran as treasurer in relation to the proceeds of said bonds were different from the duties imposed upon said Cochran as treasurer in reference to the general funds of said county, and this defendant is responsible only for the failure of the said Cochran to perform those duties fixed by the act under which the said bonds were issued.

EDGAR H. GANS,
THOS. A. WHELAN,

THOS. H. WATTS,
ALEX TROY,
Attys. for Fidelity & Deposit Co. of Maryland.

We hereby certify that in our opinion the foregoing
47 demurrer is well taken. THOS. A. WHELAN,
EDGAR A. GANS,
THOS. H. WATTS,
ALEX TROY,
Attys. for F. & D. Co. of Md.

Before me, L. H. Dawson, Jr., Deputy Clerk of the Circuit Court of the United States for the Middle District of Alabama, personally appeared Thos. A. Whelan, who is known to me, and who being duly sworn, on oath deposes and says that he is the vice-president of the Fidelity & Deposit Co. of Md., and authorized to act for the said corporation in this behalf, and that the said demurrer is not interposed for delay.

THOS. A. WHELAN.

Sworn to and subscribed before me this 23rd day of May, 1903. L. H. DAWSON, JR.
Deputy Clerk U S. Cir. Court, Mid. Dist. of Ala.

Filed May 23, 1903.. J. W. DIMMICK, Clerk.

PLEAS OF JOHN J. COCHRAN.

In the Circuit Court of the United States for the Middle District of Alabama.

County of Montgomery
versus
Fidelity & Deposit Company of Maryland and John J. Cochran.

Comes John J. Cochran and for answer to each count of the complaint, separately, says:

1. This defendant denies each and every allegation in the said count contained.

2. This defendant by way of plea to each and all of the counts avers that the money sued for in this case is the proceeds alleged to have arisen from the sale of one hundred thousand ($100,000.00) dollars of road and bridge bonds issued by the board of revenue of Montgomery County under and by virtue of an act of the legislature of Alabama referred to in the fifth count of the complaint; that said bonds were awarded to Josiah Morris & Co.; that Josiah Morris & Co., acted, in the payment of said bonds, through John P. Kohn, their confiden-

tial clerk and agent; that said Kohn drew a check in the amount of one hundred and eleven thousand one hundred and
48 nine and 58-100 ($111,109.58) dollars in the name of Josiah Morris & Co., upon themselves, payable to the order of said Cochran, treasurer; that said Kohn tendered the check to Allen, clerk of the board of revenue; that in all the acts of said Kohn up to the tender of the said check to Allen he was acting for and as the agent of Josiah Morris & Co.; that after the tender of said check to Allen the said Allen exacted a receipt from said Kohn; that said Kohn delivered to Allen the receipt set forth in the fifth count of the complaint, and thereupon the said Allen delivered to him the said bonds. And this defendant avers that in the receiving of said bonds he acted as the agent and confidential clerk of Josiah Morris & Co. That after the receipt of said check from Allen the said Kohn deposited the said check in the banking house of Josiah Morris & Co., and received credit therefor in the name of Cochran, treasurer, and made an entry upon the books of the treasurer of the receipt of said sum. This defendant avers that when he received the check from Allen, when he deposited the same in bank and when he made the entry on the book of the treasurer, he purported to act for said Cochran as his deputy. And now this defendant further avers that at the time said bonds were awarded to Josiah Morris & Co.; at the time Kohn, as agent for Josiah Morris & Co., tendered the check to Allen; at the time he received the bonds and at the time he deposited the check and made the entry in the book of the treasurer, the said Kohn well knew that Josiah Morris & Co., were insolvent and utterly unable to pay the said check, and that the fact of the insolvency of the said Josiah Morris & Co., at the respective times mentioned was utterly unknown to the said Cochran, treasurer; nor were any of the acts of the said Kohn done by him whilst he purported to act as the deputy of Cochran, as hereinbefore stated, ratified or confirmed by the said Cochran with knowledge of the said insolvency. Wherefore the defendant avers that said Kohn in the transaction hereinbefore stated was not legally the agent or deputy of said Cochran authorized to bind him or the surety of his bond with relation to any of the said acts hereinbefore stated as having been done by him relative to the taking of the said check, its deposit of the making of said entry in said book.

3. For a plea separately filed to each of the counts to the first, second, third and fifth, 6th, 7th and 8th counts, this defendant says:

1. That the money sought to be recovered in the suit is the proceeds of an alleged sale of one hundred thousand ($100,-

000.00) dollars of bonds issued by the plaintiff and agreed to be sold by the plaintiff to Josiah Morris & Co. And
49 this defendant avers that no money was ever paid for said bonds and that no money arising from the sale of said bonds was ever received by the said Cochran as treasurer nor by any one acting under authority of said Cochran as treasurer; and this defendant avers that the act authorizing the sale of said bonds required that said bonds should not be sold for less than par, in money, and required that said money when paid for said bonds should be paid to said Cochran as treasurer, to be used under the direction and by the authority of the board of revenue of plaintiff in building and improving roads and erecting bridges. And this defendant avers the facts in relation to the alleged sale of said bonds and the alleged receipt by the said Cochran of the proceeds of said bonds are not as alleged in either of the said counts, but are, in substance, as follows, to-wit:

That the bonds were awarded to Josiah Morris & Co. by the board of revenue of plaintiff on, to-wit: the 8th day of January, 1901, at and for the sum of one hundred and eleven thousand and one hundred and nine and 58/100 ($111,109.58) dollars to be paid in cash upon the delivery of said bonds; that prior to the said 8th day of January, 1901, one John P. Kohn had been by the said Cochran appointed as his, the said Cochran's, deputy with the authority shown by the power of attorney set out in the fifth count of the complaint, and on the said 8th day of January, 1901, the said Kohn was still such deputy, with the powers only as shown by the said power of attorney; and the said Kohn was on, and had been for some years prior to the 8th day of January, 1901, the confidential agent or clerk of said Josiah Morris & Company; that the said Kohn acted for the said Josiah Morris & Company in and about the alleged purchase of the said bonds from plaintiff, and that in alleged payment to plaintiff for said bonds, the said Kohn, acting for the said Josiah Morris & Company, drew a check on, to-wit: the said 8th day of January, 1901, in the name of and on the said Josiah Morris & Company in the sum of one hundred and eleven thousand one hundred and nine and 58-100 ($111,109.58) dollars, payable to said Cochran as treasurer, and handed the same to one Allen who was the clerk of the said board of revenue of the plaintiff and who knew the said Kohn was in the transaction herein mentioned acting in the dual capacity of clerk to Josiah Morris & Co. and deputy to the said Cochran; and that said Allen acted for the plaintiff in the alleged sale of said bonds; that the said Allen immediately handed the said check back to the said Kohn and the said Kohn in exchange for said check

50 then and there handed to said Allen the receipt set forth in the fifth count of the complaint; that the said Allen delivered the said bonds to said Kohn, as clerk of the said Josiah Morris & Company, well knowing that nothing had been received as proceeds for the sale of said bonds except the aforesaid check in exchange for which the aforesaid receipt was given; and the said Allen knew that the said Kohn had no lawful authority to receive and receipt for said check in the name of said Cochran as money; and thereupon the said Kohn took the said check and deposited it in the bank of the said Josiah Morris & Company on, to-wit: the said 8th day of January, 1901, and wrote or caused to be written upon the books of said Josiah Morris & Company an entry of one hundred and eleven thousand one hundred and nine and 58-100 ($111,-109.58) dollars evidencing a credit to the said Cochran by the said Josiah Morris & Company of the last mentioned sum; and in no other way than as alleged above has anything been received from the sale of said bonds, and this defendant avers that the said act authorizing the issue and sale of said bonds did not make the bond of said Cochran liable for anything except money as the proceeds of said bonds.

4. For plea separately filed to each of the counts to the first, second, third and fifth, 6th, 7th and 8th counts, this defendant says that the money sought to be recovered in this suit is the proceeds of an alleged sale of one hundred thousand ($100,-000.00) dollars of bonds issued by the plaintiff and agreed to be sold by the plaintiff to Josiah Morris & Co. And this defendant avers that no money arising from the sale of said bonds was ever received by the said Cochran as treasurer nor by any one acting under authority of said Cochran as treasurer; and this defendant avers that the act authorizing the sale of said bonds required that said bonds should not be sold for less than par, in money, and required that said money when paid for said bonds should be paid to said Cochran as treasurer, to be used under the direction and by the authority of the board of revenue of plaintiff in building and improving roads and erecting bridges. And this defendant avers the facts in relation to the alleged sale of said bonds and the alleged receipt by the said Cochran of the proceeds of said bonds are not as alleged in either of the said counts, but are, in substance, as follows, to-wit:

That the bonds were awarded to Josiah Morris & Company by the board of revenue of plaintiff on, to-wit: the 8th day of January, 1901, at and for the sum of one hundred and eleven thousand one hundred and nine and 58/-00 (111,-

109.58) dollars, to be paid in cash upon the delivery of
51 said bonds; that prior to the said 8th day of January, 1901, one John P. Kohn had been by the said Cochran appointed as his, the said Cochran's deputy with the authority shown by the power of attorney set out in the fifth count of the complaint, and on the said 8th day of January, 1901, the said Kohn was still such deputy, with the powers only as shown by the said power of attorney; and the said Kohn was on, and had been for some years prior to, the 8th day of January, 1901, the confidential agent or clerk of said Josiah Morris & Company, drew a check on, to-wit: the said 8th day of January, 1901, in the name of and on the said Josiah Morris & Com-Company in and about the alleged purchase of the said bonds from plaintiff, and that in alleged payment to plaintiff for said bonds, the said Kohn, acting for the said Josiah Morris & Company, drew a check on, to-wit: the said 8th day of January, 1901, in the name of and on the said Josiah Morris & Company, in the sum of one hundred and eleven thousand one hundred and nine and 50/100 ($111,109.58) dollars, payable to said Cochran as treasurer, and handed the same to one Allen who was the clerk of the said board of revenue of the plaintiff and who knew the said Kohn was in the transaction herein mentioned acting in the dual capacity of clerk to Josiah Morris & Co. and deputy to the said Cochran; and that said Allen acted for the plaintiff in the said alleged sale of said bonds; that the said Allen immediately handed the said check back to the said Kohn and the said Kohn in exchange for said check then and there handed to said Allen the receipt set forth in the fifth count of the complaint; that the said Allen delivered the said bonds to said Kohn, as clerk for the said Josiah Morris & Company, well knowing that nothing had been received as proceeds for the sale of said bonds except the aforesaid check in exchange for which the aforesaid receipt was given; and the said Allen knew that the said Kohn had no lawful authority to receive and receipt for said check in the name of said Cochran as money; and thereupon the said Kohn took the said check and deposited it in the bank of the said Josiah Morris & Company on, to-wit: the said 8th day of January, 1901, and wrote or caused to be written upon the books of said Josiah Morris & Company an entry of one hundred and eleven thousand one hundred and nine and 58/100 ($111,109.58) dollars, evidencing a credit to the said Cochran by the said Josiah Morris & Company of the last mentioned sum; and in no other way than as alleged above has anything been received from the sale of said bonds, and this defendant avers that the said act authorizing the issue and sale of said bonds did not make the bond of

said Cochran liable for anything except money as the proceeds of said bonds. And this defendant further says that
52 at the time the aforesaid check was drawn and delivered and at the time said bonds were delivered and at the time the said check was deposited with Josiah Morris & Company to the credit of Cochran, treasurer, the said Josiah Morris & Company were totally insolvent and totally unable to pay said check, all of which facts were well known to the said Kohn.

5. For further plea separately to each of the counts 1, 2, 3 and 5th, 6th, 7th and 8th, this defendant says this defendant adopts and reiterates each and every allegation contained in plea number 3 as though specifically set out herein, and in addition thereto avers that this defendant never contracted or agreed to be responsible for the acts of the said Kohn or any deputy of the said Cochran, but only for the acts of the said Cochran.

6. For further pleas separately filed to each of the counts 1, 2, 3 and 5, 6, 7 and 8, this defendant says that the money sought to be recovered in this suit is the sum of one hundred and eleven thousand one hundred and nine and 58/100 ($111,109.58) dollars alleged to be the proceeds of the sale of one hundred thousand ($100,000.00) dollars of bonds issued by the plaintiff and sold by it to Josiah Morris & Company. This defendant avers that no money arising from the sale of said bonds was ever received by the said Cochran as treasurer or by any one acting under the authority of said Cochran as treasurer. And this defendant avers the facts in relation to the sale of said bonds and the alleged receipt by the said Cochran of the proceeds of the sale of said bonds not to be as alleged in the fifth, 6th, 7th and 8th counts, but to be, in substance, as follows:

That said Cochran whilst treasurer delivered to said John P. Kohn the paper set out as a power of attorney in the fifth count, and under said authority and no other the said Kohn purported to act and did act as the deputy of said Cochran; that the said Kohn was on the 8th day of January, 1901, and until the 25th day of January, 1901, an employe of the banking house of Josiah Morris & Company; that under the authority of the act approved December 13th, 1900, the board of revenue of Montgomery County issued and negotiated the sale, on the said 8th day of January, 1901, one hundred thousand ($100,000.00) dollars of road and bridge bonds to the said Josiah Morris & Company, at and for the sum of one hundred and eleven thousand one hundred and nine and

58/100 ($111,109.58) dollars; that said Kohn representing Josiah Morris & Company tendered to Charles A. Allen, clerk of the board of revenue of said county, in payment for said bonds a check in the sum of one hundred and eleven
53 thousand one hundred and nine and 58/100 ($111,109.58) dollars, dated January 8th, 1901, payable to the order of John J. Cochran, county treasurer, and drawn in the name of Josiah Morris & Company upon themselves, whereupon the said Allen asked said Kohn for a receipt from the county treasurer; that said Kohn then left the office of the board of revenue and returned shortly thereafter with the receipt set out in the fifth count of the complaint and handed the same to the said Allen, and thereupon the said Allen allowed the said Kohn to retain the possession of the said check and handed the said Kohn the said bonds, the said Allen well knowing that nothing had been received by the said Kohn or Cochran as proceeds of said bonds except the said check above referred to. And defendant avers that no money was ever collected upon said check, and that in no other way than substantially as above alleged has anything been received by said Cochran, treasurer, or by any one acting under his authority, as the proceeds of the sale of said bonds.

HILL & HILL,
Attys. for John J. Cochran.

Filed this the 25th day of May, 1903.
J. W. DIMMICK, Clerk.

PLEAS OF FIDELITY & DEPOSIT COMPANY.

In the Circuit Court of the United States for the Middle District of Alabama.

County of Montgomery
vs.
Fidelity & Deposit Company of Maryland and Jno. J. Cochran.

Comes the Fidelity & Deposit Company of Maryland, and for answer to each count of the complaint, separately, says:

1. This defendant denies each and every allegation in the said count contained.

2. This defendant by way of plea to each and all of the counts avers that the money sued for in this case is the proceeds alleged to have arisen from the sale of one hundred thousand ($100,000.00) dollars of road and bridge bonds issued by

the board of revenue of Montgomery County under and by virtue of an act of the legislature of Alabama referred to in the fifth count of the complaint; that said bonds were awarded to Josiah Morris & Co.; that said Josiah Morris & Co.
54 acted, in the payment for said bonds, through John P. Kohn, their confidential clerk and agent; that said Kohn drew a check in the amount of one hundred and eleven thousand one hundred and nine and 58/100 ($111,109.58) dollars in the name of Josiah Morris & Co., upon themselves, payable to the order of said Cochran, treasurer; that said Kohn tendered the check to Allen, clerk of the board of revenue; that in all the acts of said Kohn up to the tender of the said check to Allen he was acting for and as the agent of Josiah Morris & Co.; that after the tender of said check to Allen the said Allen exacted a receipt from said Kohn; that said Kohn delivered to Allen the receipt set forth in the fifth count of the complaint, and thereupon the said Allen delivered to him the said bonds. And this defendant avers that in the receiving of said bonds he acted as the agent and confidential clerk of Josiah Morris & Co. That after the receipt of said check from Allen the said Kohn deposited the said check in the banking house of Josiah Morris & Co., and received credit therefor in the name of Cochran, treasurer, and made an entry upon the books of the treasurer of the receipt of said sum. This defendant avers that when he received the check from Allen, when he deposited the same in bank and when he made the entry on the book of the treasurer, he purported to act for said Cochran as his deputy. And now this defendant further avers that at the time said bonds were awarded to Josiah Morris & Co.; at the time Kohn, as agent for Josiah Morris & Co., tendered the check to Allen; at the time he received the bonds and at the time he deposited the check and made the entry in the book of the treasurer, the said Kohn well knew that Josiah Morris & Co., were insolvent and utterly unable to pay the said check, and that the fact of the insolvency of the said Josiah Morris & Co., at the respective times mentioned was utterly unknown to the said Cochran, treasurer; nor were any of the acts of the said Kohn done by him whilst he purported to act as the deputy of Cochran, as hereinbefore stated, ratified or confirmed by the said Cochran with knowledge of the said insolvency. Wherefore the defendant avers that said Kohn in the transaction hereinbefore stated was not legally the agent or deputy of said Cochran authorized to bind him or the surety of his bond with relation to any of the said acts hereinbefore stated as having been done by him relative to the taking of the said check, its deposit or the making

of said entry in said book, and this defendant denies that this defendant had any knowledge at the time of the execution of the bond or afterwards until the failure of Josiah Morris & Co., of any of the matters alleged in any of said counts as to
55 the appointment of said Kohn as the deputy of said Cochran or of the acts of said Kohn as such deputy as alleged in said count.

3. For plea separately filed to each of the counts first, second, third, fifth, sixth, seventh and eighth counts, this defendant says:

1. That the money sought to be recovered in this suit is the proceeds of an alleged sale of one hundred thousand ($100,000) dollars of bonds issued by the plaintiff and agreed to be sold by the plaintiff to Josiah Morris & Co. And this defendant avers that no money was ever paid for said bonds and that no money arising from the sale of said bonds was ever received by the said Cochran as treasurer nor by any one acting under authority of said Cochran as treasurer; and this defendant avers that the act authorizing the sale of said bonds required that said bonds should not be sold for less than par, in money, and required that said money when paid for said bonds should be paid to Cochran as treasurer, to be used under the direction and by the authority of the Board of Revenue of plaintiff in building and improving roads and erecting bridges. And this defendant avers the facts in relation to the alleged sale of said bonds and the alleged receipt by the said Cochran of the proceeds of said bonds are not as alleged in either of the said counts, but are, in substance, as follows, to-wit:

That the bonds were awarded to Josiah Morris & Co., by the Board of Revenue of plaintiff on, to-wit: the 8th day of January 1901, at and for the sum of One Hundred and Eleven Thousand, One Hundred and Nine and 58/100 ($111,109.58) Dollars, to be paid in cash upon the delivery of said bonds; that prior to the said 8th day of January, 1901, one John P. Kohn had been by the said Cochran appointed as his, the said Cochran's deputy with the authority shown by the power of attorney set out in the fifth count of the complaint, and on the said 8th day of January, 1901, the said Kohn was still such deputy with the powers only as shown by the said power of attorney; and the said Kohn was on, and had been for some years prior to, the 8th day of January, 1901, the confidential agent or clerk of said Josiah Morris & Company; that the said Kohn acted for the said Josiah Morris & Company in, and that in alleged purchase of the said bond from plaintiff, and that in alleged payment to plaintiff for said bonds, the

said Kohn, acting for the said Josiah Morris & Company, drew a check on, to-wit: the said 8th day of January, 1901, in the name of and on the said Josiah Morris & Company in the sum of One Hundred and Eleven Thousand, One Hundred and Nine and 58-100 ($111,109.58) Dollars, payable to said
56 Cochran as Treasurer, and handed the same to one Allen, who was the clerk of the said Board of Revenue of the plaintiff and who knew the said Kohn was in the transaction herein mentioned acting in the dual capacity of clerk to Josiah Morris & Company and deputy to the said Cochran; and that said Allen acted for the plaintiff in the alleged sale of said bonds; that the said Allen immediately handed the said check back to the said Kohn and the said Kohn in exchange for said check then and there handed to said Allen the receipt set forth in the fifth count of the complaint; that the said Allen delivered the said bonds to said Kohn as clerk for the said Josiah Morris & Company, well knowing that nothing had been received as proceeds for the sale of said bonds except the aforesaid check in exchange for which the aforesaid receipt was given; and the said Allen knew that the said Kohn had no lawful authority to receive and receipt for said check in the name of said Cochran as money; and thereupon the said Kohn took the said check and deposited it in the bank of the said Josiah Morris & Company on, to-wit: the said 8th day of January, 1901, and wrote or caused to be written upon the books of said Josiah Morris & Company an entry of One Hundred and Eleven Thousand, One Hundred and Nine and 58-100 ($111,109.58) Dollars, evidencing a credit to the said Cochran by the said Josiah Morris & Company of the last mentioned sum; and in no other way than as alleged above has anything been received from the sale of said bonds, and this defendant avers that the said Act authorizing the issue and sale of said bonds did not make the bond of said Cochran liable for anything except money as the proceeds of said bonds.

4. For each plea separately filed to each of the counts first, second, third, fifth, sixth, seventh and eighth counts, this defendant says: That the money sought to be recovered in this suit is the proceeds of an alleged sale of One Hundred Thousand ($100,000.00) Dollars of bonds issued by the plaintiff and agreed to be sold by the plaintiff to Josiah Morris & Company. And this defendant avers that no money arising from the sale of said bonds was ever received by the said Cochran as Treasurer nor anyone acting under authority of said Cochran as Treasurer; and this defendant avers that the Act authorizing the sale of said bonds required that said bonds should not be sold for

less than par, in money, and required that said money when paid for said bonds should be paid to said Cochran as Treasurer, to be used under the direction and by the authority of the Board of Revenue of plaintiff in building and improving roads and erecting bridges.

And this defendant avers the facts in relation to the
57 alleged sale of said bonds and the alleged receipt by the said Cochran of the proceeds of said bonds are not as alleged in either of the said counts, but, are in substance, as follows, to-wit:

That the bonds were awarded to Josiah Morris & Company by the Board of Revenue of plaintiff on, to-wit: the 8th day of January, 1901, at and for the sum of One Hundred and Eleven Thousand, One Hundred and Nine and 58-100 ($111,109.58) Dollars, to be paid in cash upon the delivery of said bonds; that prior to the said 8th day of January, 1901, one John P. Kohn had been by the said Cochran appointed as his, the said Cochran's, deputy with the authority shown by the power of attorney set out in the fifth count of the complaint, and on the said 8th day of January, 1901, the said Kohn was still such deputy, with the powers only as shown by the said power of attorney; and the said Kohn was on, and had been for some years prior to, the 8th day of January, 1901, the confidential agent or clerk of said Josiah Morris & Company; that the said Kohn acted for the said Josiah Morris & Company in and about the alleged purchase of the said bonds from plaintiff, and that in alleged payment to plaintiff for said bonds, the said Kohn, acting for the said Josiah Morris & Company, drew a check on, to-wit: the said 8th day of January, 1901, in the name of and on the said Josiah Morris & Company, in the sum of One Hundred and Eleven Thousand, One Hundred and Nine and 58/100 ($111,109.58) Dollars, payable to said Cochran as Treasurer, and handed the same to one Allen who was the clerk of the said Board of Revenue of the plaintiff and who knew the said Kohn was in the transaction herein mentioned acting in the dual capacity of clerk to Josiah Morris & Company and deputy to the said Cochran; and that said Allen acted for the plaintiff in the alleged sale of said bonds; that the said Allen immediately handed the said check back to the said Kohn and the said Kohn in exchange for said check then and there handed to said Allen the receipt set forth in the fifth count of the complaint; that the said Allen delivered the said bonds to said Kohn, as clerk for the said Josiah Morris & Company, well knowing that nothing had been received as proceeds for the sale of said bonds except the aforesaid check in exchange for which the aforesaid receipt was

given; and the said Allen knew that the said Kohn had no lawful authority to receive and receipt for said check in the name of said Cochran as money; and thereupon the said Kohn took the said check and deposited it in the bank of the said Josiah Morris & Co., on, to-wit: the said 8th day of January, 1901, and wrote or caused to be written upon the books
58 of said Josiah Morris & Company an entry of One Hundred and Eleven Thousand, One Hundred and Nine and 58-100 ($111,109.58)Dollars, evidencing a credit to the said Cochran by the said Josiah Morris & Company of the last mentioned sum; and in no other way than as alleged above has anything been received from the sale of said bonds, and this defendant avers that the said Act authorizing the issue and sale of said bonds did not make the bond of said Cochran liable for anything except money as the proceeds of said bonds. And this defendant further says that at the time the aforesaid check was drawn and delivered and at the time said bonds were delievered and at the time said check was deposited with Josiah Morris & Company to the credit of Cochran, Treasurer, the said Josiah Morris & Company were totally insolvent and totally unable to pay said check, all of which facts were well known to the said Kohn.

5. For further plea separately filed to each of the counts one, two, three and five, this defendant says, this defendant adopts and reiterates each and every allegation contained in plea number 3 as though specifically set out herein, and in addition thereto avers that this defendant never contracted or agreed to be responsible for the acts of the said Kohn or any deputy of the said Cochran, but only for the acts of the said Cochran.

6. For further plea separately filed to each of the counts one, two, three, five, six, seven and eight, this defendant says: That the money sought to be recovered in this suit is the sum of One Hundred and Eleven Thousand, One Hundred and Nine and 58-100 ($111,109.58) Dollars alleged to be the proceeds of the sale of One Hundred Thousand ($100,000.00) Dollars of bonds issued by the plaintiff and sold by it to Josiah Morris & Company. This defendant avers that no money arising from the sale of said bonds was ever received by the said Cochran as Treasurer, or by anyone acting under the authority of said Cochran as Treasurer. And this defendant avers the facts in relation to the sale of said bonds and the alleged receipt by the said Cochran of the proceeds of the sale of said bonds not to be as alleged in the fifth, sixth, seventh and eighth counts, but to be in substance, as follows:

That the said Cochran whilst Treasurer delivered to said John P. Kohn the paper set out as a power of attorney in the fifth count, and under said authority and no other the said Kohn purported to act and did act as the deputy of said Cochran; that the said Kohn was on the 8th day of January, 1901, and until the 25th day of January, 1901, an employe of
59 the Banking House of Josiah Morris & Company; that under the authority of the act approved December 13th, 1900, the Board of Revenue of Montgomery County issued and negotiated the sale, on the said 8th day of January, 1901, One Hundred Thousand ($100,000.00) Dollars of road and bridge bonds to the said Josiah Morris & Company, at and for the sum of One Hundred and Eleven Thousand, One Hundred and Nine and 58-100 ($111,109.58) Dollars; that said Kohn representing Josiah Morris & Company tendered to Charles A. Allen. Clerk of the Board of Revenue of said County, in payment for said bonds a check in the sum of One Hundred and Eleven Thousand, One Hundred and Nine and 58-100 ($111,109.58) Dollars, dated January 8th, 1901, payable to the order of John J. Cochran, County Treasurer, and drawn in the name of Josiah Morris & Company upon themselves, whereupon the said Allen asked said Kohn for a receipt from the County Treasurer; that said Kohn then left the office of the Board of Revenue and returned shortly thereafter with the receipt set out in the fifth count of the complaint and handed the same to the said Allen, and thereupon the said Allen allowed the said Kohn to retain the possession of the said check and handed the said Kohn the said bonds, the said Allen well knowing that nothing had been received by the said Kohn or Cochran as proceeds of said bonds except the said check above referred to. And defendant avers that no money was ever collected upon said check, and that in no other way than substantially as above alleged has anything been received by said Cochran, Treasurer, or by anyone acting under his authority, as the proceeds of the sale of said bonds.

EDGAR H. GANS,
THOS A WHELAN,
THOS. H. WATTS,
ALEX TROY.
Attys. for Fidelity & Deposit Co. of Md.

Filed May 25th. 1903. J. W. DIMMICK, Clerk.

PLAINTIFF'S DEMURRER TO PLEAS OF COCHRAN.

60

In the Circuit Court of the United States for the Middle District of Alabama.

County of Montgomery, Plaintiff,
vs.
John J. Cochran, and The Fidelity & Deposit Company of Maryland, Defendants.

The plaintiff in the above entitled cause demurs to the pleas of the defendant John J. Cochran as hereinafter set forth:

To plea numbered 2, as addressed to each count of the complaint separately and severally, plaintiff demurs and for grounds of demurrer thereto assigns the following:

1. Said plea shows that the defendant is bound by the acts of the said deputy Kohn as alleged therein.

2. Said plea shows that said Kohn was a duly appointed deputy of said treasurer Cochran and that said Kohn as such deputy received said sum of $111,109.58 in such manner as to render defendant liable therefor in this action.

3. Said plea shows that the said Kohn was the duly appointed deputy of said treasurer Cochran and that said treasurer, through his said deputy, collected said sum of $111,109.58 and made a general deposit thereof to his credit as such treasurer in such bank.

4. Said plea shows that defendant Cochran, as the treasurer of the plaintiff, received said sum of $111,109.59 and that he did not safely keep said money but made a general deposit thereof to his credit as such treasurer in said bank.

5. Said plea is self-contradictory in that it shows that the defendant Cochran, as such treasurer, collected the amount of said check by making a general deposit thereof to his credit in said bank and avers that the said bank was insolvent and unable to pay said check.

6. Said plea presents an issue of law and not of fact in that it avers that the said Kohn, "in the transaction hereinbefore stated was not lawfully the agent or deputy of said Cochran authorized to bind him or the surety on his bond with relation to any of the said acts hereinbefore stated as having been done by him relative to the taking of the said check, its deposit or the making of said entry in said book."

7. Said plea shows that said Kohn was the duly appointed

61 deputy of said treasurer Cochran, hence the knowledge of said Kohn touching the alleged insolvency of said bank was knowledge thereof on the part of said Cochran.

8. Said plea shows that defendant Cochran as treasurer, through his said deputy Kohn, had knowledge of the alleged insolvency of said bank and the want of such knowledge cannot be here set up by the defendant in defense or avoidance of the said acts of said deputy Kohn touching the receipt or collection by him as such deputy of said sum of money arising from the sale of said bonds.

9. Said plea shows that the defendant is bound by the knowledge of said deputy Kohn as alleged in said plea touching the alleged condition of said bank.

10. Said plea shows that plaintiff parted with its bonds upon the faith of the receipt of said treasurer Cochran for the purchase money and defendant cannot be heard to say that said purchase money was not in fact received by the said treasurer.

11. Said plea shows that said treasurer Cochran, by and through his said deputy Kohn, undertook to collect and receive said sum of $111,109.58, the proceeds of the sale of said bonds, and said plea shows a breach of the condition of the bond of said treasurer in that said plea avers that said treasurer did not in fact collect said sum and said plea shows no sufficient excuse for failing to so collect the same.

12. Said plea does not deny or confess and avoid the allegations of the complaint showing that said treasurer Cochran, by his said deputy, received a check for said sum of $111,109.58, executed his receipt to the Board of Revenue for said sum of money and made a general deposit of said sum in said bank.

13. It appears from said plea that the defendant Cochran appointed said Kohn as his deputy and thereby enabled him to do the acts set forth in said plea in the name of said treasurer; that the plaintiff was innocent of any wrong in the premises and that the loss occasioned by said acts of said deputy Kohn must be borne by the defendant.

14. The alleged knowledge on the part of Allen touching the condition of said bank and the value of said check constitutes no defense to this action.

15. Said plea tenders an immaterial issue in that it avers "that at the time said bonds were awarded to said Josiah Morris & Co.; at the time Kohn as agent for Josiah Morris & Co., tendered the check to Allen; at the time he received the bonds and at the time he deposited the check and made the entry in

the book of the treasurer, the said Kohn well knew
62 that said Josiah Morris & Co., were insolvent and utterly unable to pay the said check, and that the fact of the insolvency of the said Josiah Morris & Co., at the respective times mentioned, was utterly unknown to said Cochran, treasurer; nor were any of the facts of the said Kohn done by him while he purported to act as the deputy of Cochran, as hereinbefore stated, ratified or confirmed by the said Cochran, with knowledge of the said insolvency."

To plea numbered 3 addressed to the first, second, third, fifth, sixth, seventh and eighth counts of the complaint separately and severally, plaintiff demurs and for grounds of demurrer assigns each of the grounds of demurrer hereinabove assigned to plea numbered 2, except the grounds numbered 6 and 15.

To plea numbered 4 as addressed to each of the first, second, third, fifth, sixth, seventh and eighth counts of the complaint, separately and severally, plaintiff demurs and for grounds of demurrer assigns each of the grounds of demurrer hereinbefore assigned to plea numbered 2, except the grounds numbered 6 and 15.

To plea numbered 5 as addressed to each of the first, second, third, fifth, sixth, seventh and eighth counts of the complaint, separately and severally, plaintiff demurs and for grounds of demurrer assigns each of the grounds of demurred hereinbefore assigned to plea numbered 2, except the 6th and 15th grounds.

To plea numbered 6 as addressed to each of the first, second, third, fifth, sixth, seventh and eighth counts of the complaint, separately and severally, plaintiff demurs and for grounds of demurrer assigns each of the grounds of demurrer hereinabove assigned to plea numbered 2, except the 6th and 15th grounds.

JNO. G. FINLEY,
J. F. STALLINGS,
W. L. MARTIN,
Attys. for Plff.

Filed this 25th day of May, 1903.

J. W. DIMMICK, Clerk.

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PLAINTIFFS DEMURRER TO PLEAS OF FIDELITY & DEPOSIT COMPANY.

In the Circuit Court of the United States for the Middle District of Alabama.

County of Montgomery, Plaintiff,
vs.
John J. Cochran and The Fidelity & Deposit Company of Maryland, Defendant

The plaintiff in the above entitled cause demurs to the pleas of the defendant The Fidelity & Deposit Company of Maryland, as hereinafter set forth:

To plea numbered 2, addressed to each count of the complaint, separately and severally, plaintiff demurs and for grounds of demurrer thereto assigns the following:

1. Said plea shows that the defendant is bound by the acts of the said deputy Kohn as alleged therein.

2. Said plea shows that the said Kohn was a duly appointed deputy of said treasurer Cochran and that said Kohn as such deputy received said sum of $111,109.58 in such manner as to render defendant liable therefor in this action.

3. Said plea shows that the said Kohn was the duly appointed deputy of said treasurer Cochran and that said treasurer, through his said deputy, collected said sum of $111,109.58 and made a general deposit thereof to his credit as such treasurer in such bank.

4. Said plea shows that defendant Cochran, as the treasurer of the plaintiff, received said sum of $111,109.58 and that he did not safely keep said money but made a general deposit thereof to his credit as such treasurer in said bank.

5. Said plea is self-contradictory in that it shows that the defendant Cochran, as such treasurer, collected the amount of said check by making a general deposit thereof to his credit in said bank and avers that the said bank was insolvent and unable to pay said check.

6. Said plea presents an issue of law and not of fact in that it avers that the said Kohn, "in the transaction hereinbefore stated, was not lawfully the agent or deputy of said Cochran authorized to bind him or the surety on his bond with relation to any of the said acts hereinbefore stated as having been done by him relative to the taking of the said check, its deposit or the making of said entry in said book."

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7. Said plea shows that said Kohn was the duly appointed deputy of said treasurer Cochran, hence the knowledge of said Kohn touching the alleged insolvency of said bank was knowledge thereof on the part of said Cochran.

8. Said plea shows that defendant Cochran as treasurer, through his said deputy Kohn, had knowledge of the alleged insolvency of said bank and the want of such knowledge cannot be here set up by the defendant in defense or avoidance of the said acts of said deputy Kohn touching the receipt or collection by him as such deputy of said sum of money arising from the sale of said bonds.

9. Said plea shows that the defendant is bound by the knowledge of said deputy Kohn as alleged in said plea touching the alleged condition of said bank.

10. Said plea shows that plaintiff parted with its bonds upon the faith of the receipt of said treasurer Cochran for the purchase money and defendant cannot be heard to say that said purchase money was not in fact received by the said treasurer.

11. Said plea shows that said Treasurer, Cochran, by and through his said deputy Kohn, undertook to collect and receive said sum of $111,109.58, the proceeds of the sale of said bonds, and said plea shows a breach of the condition of the bond of said treasurer in that said plea avers that said treasurer did not in fact collect said sum and said plea shows no sufficient excuse for failing to so collect the same.

12. Said plea does not deny or confess and avoid the allegations of the complaint showing that said treasurer Cochran, by his said deputy, received a check for said sum of $111,109.58, executed his receipt to the board of revenue for said sum of money and made a general deposit of said sum in said bank.

13. It appears from said plea that the defendant Cochran appointed said Kohn his deputy and thereby enabled him to do the acts set forth in said plea in the name of said treasurer; that the plaintiff was innocent of any wrong in the premises and that the loss occasioned by the said acts of said deputy Kohn must be borne by the defendant.

14. The alleged knowledge on the part of Allen touching the condition of said bank and the value of said check constitutes no defense to this action.

15. Said plea tenders an immeterial issue in that it avers "that at the time said bonds were awarded to said Josiah Morris & Company; at the time Kohn as agent for Josiah Morris & Company tendered the check to Allen; at the time he received

65 the bonds and at the time he deposited the check and made the entry in the book of the treasurer, the said Kohn well knew that said Josiah Morris & Co., were insolvent and utterly unable to pay the said check, and that the fact of the insolvency of the said Josiah Morris & Company at the respective times mentioned was utterly unknown to said Cochran, treasurer; nor were any of the acts of the said Kohn done by him while he purported to act as the deputy of Cochran, as hereinbefore stated, ratified or confirmed by the said Cochran, with knowledge of the said insolvency."

To plea numbered 3 addressed to the first, second, third, fifth, sixth, seventh and eighth counts of the complaint, separately and severally, plaintiff demurs and for grounds of demurred assigns each of the grounds of demurrer hereinabove assigned to plea numbered 2, except the grounds numbered 6 and 15.

To plea numbered 4 addressed to the first, second, third, fifth, sixth. seventh and eighth counts of the complaint, separately and severally, plaintiff demurs and for grounds of demurrer assigns each of the grounds of demurrer hereinabove assigned to plea numbered 2, except the grounds numbered 6 and 15.

To plea numbered 5 addressed to each of the first, second, third, fifth, sixth, seventh and eighth counts of the complaint, separately and severally, plaintiff demurs and for grounds of demurrer assigns each of the grounds hereinabove assigned to plea numbered 2, except the 6th and 15th grounds.

The plea numbered 6 as addressed to each of the first, second, third, fifth, sixth. seventh and eighth counts of the complaint, separately and severally. plaintiff demurs and for grounds of demurrer assigns each of the grounds of demurrer hereinbefore assigned to plea numbered 2, except the 6th and 15th grounds.

JNO. G. FINLEY,
J. F. STALLINGS,
W. L. MARTIN,
Attys. for Plaintiff.

Filed this 25th day of May, 1903.

J.W.DIMMICK,Clerk.

DEMURRER OF DEFENDANT JOHN J. COCHRAN.

In the Circuit Court of the United States for the Middle District of Alabama.

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County of Montgomery

vs.

Fidelity & Deposit Company of Maryland, and John J. Cochran

Demurrer to the Complaint.

Comes John J. Cochran, one of the defendants in the above stated cause, and separately demurs to each count of the complaint. and as grounds of demurrer assigns the following:

1. Said John J. Cochran as County Treasurer of Montgomery County is made by law custodian of the funds sought to be recovered herein, and no reason is shown why there should be a recovery of the said funds, or the value thereof, in favor of plaintiff, and no right in the plaintiff to recover said funds is shown by said count.

2. It appears in and by the said count that the said John J. Cochran is the treasurer of the said County of Montgomery and as such is entitled to retain the custody of all the funds of the plaintiff.

3. It is not averred or shown by said count that it has ever become the duty of said Cochran as county treasurer to pay to plaintiff or anyone else any part of the funds sought to be recovered in said count or any amount on account thereof.

4. It is averred as a conclusion of the pleader that the plaintiff has lost said money by reason of said deposit in said bank and no facts are averred in support of said conclusion.

5. It is not averred or shown that any demand has been made upon the said Cochran in the manner provided by law for the payment of said money, or any part thereof, before the bringing of this suit.

6. That said Cochran is entitled to the possession of said money and is required by law to pay it out upon warrant or warrants properly and legally drawn. and it is not averred or shown that any warrant has been drawn upon him for

67 the payment of any of said money or that he has failed to pay any warrant so drawn upon him as such treasurer.

7. It is averred that the said Cochran deposited the money of the plaintiff in said bank; but for aught that appears in said count. the said Cochran may have drawn said money from the

said bank in payment of warrants legally drawn on him as said treasurer.

8. It does not appear that this defendant ever agreed to be responsible for the acts of any deputy of Cochran.

9. It appears that the said Kohn was acting in a dual capacity, viz: agent of Josiah Morris & Co., and deputy of Cochran. and it does not appear that the said Cochran had any notice, knowledge or information that the said Kohn was so acting or had so acted.

This defendant assigns as additional grounds of demurrer to the fifth count of the complaint the following:

1. That it appears from said count that John P. Kohn was not the agent, deputy or attorney in fact of said John J. Cochran, because the power of attorney set forth in said count is illegal and against public policy.

2. That it appears from said count that John P. Kohn was not the agent, deputy or attorney in fact of said John J. Cochran, because the power of attorney set forth in said count is illegal and against public policy, and that the said power of attorney is not given to the said Kohn for the performance of some special act or by reason of any special emergency for and instead of the treasurer, but is substantially a surrender by the treasurer to the said Kohn of the exercise of the functions of his office.

3. It is against public policy for the said Cochran to appoint the said Kohn to perform all of the duties of the office of treasurer and said power of attorney for said reason was void.

4. That the appointment of a deputy or attorney in fact or agent by a county treasurer is not authorized by any law of the State of Alabama.

5. It was contrary to the law of Alabama for the said Cochran as county treasurer to appoint said Kohn as his
68 agent, attorney in fact or deputy to transact the duties of treasurer of Montgomery County.

6. It does not appear from the said count that this defendant agreed or contracted to be responsible for the acts of any deputy of said Cochran as treasurer.

7. It is alleged that Kohn had the right to receive and receipt for money, but it is not alleged that Kohn had the right to receipt for anything except money.

8. It is alleged that Kohn was authorized to do all the acts that Cochran could lawfully do, but it is not alleged that Kohn was authorized to do unlawful acts, and the acts of said Kohn alleged, were unlawful.

9. It does not appear that said Kohn or Cochran received any money of the plaintiff.

10. It does not appear that Kohn had any authority to receive or receipt for anything except money in the name of said Cochran.

11. It is not alleged that any money was ever paid for said bonds.

12. It is not alleged that said Cochran knew anything of the actions of said Kohn in giving said receipt without receiving the money mentioned therein.

13. It does not appear that said Cochran authorized said Kohn to make entry on the books of the county treasurer of money received when none had been received.

14. It is not alleged that said Cochran knew anything of said entry upon said treasurer's books, or that he authorized said Kohn to make it.

15. Entry upon the books of said Cochran by said Kohn of the receipt of money where no money was in fact received, did not bind this defendant.

16a. It is alleged that Kohn could only do what Cochran could lawfully do, and that Kohn issued in the name of Cochran a receipt to said board of revenue as though he had received one hundred [and] eleven thousand, one hundred and nine and 58/100 ($111,109.58) dollars, when he had not received it, and it is not alleged that Cochran could lawfully have issued any such receipt so as to bind his surety.

69 17. It is shown in said count that Cochran authorized Kohn to receipt for only such money as came into the possession of Cochran, and it is not alleged that any money was received, but only the promissory note of Josiah Morris & Co.

As demurrer to the sixth count, this defendant assigns the following grounds, to-wit:

1. The fifth and sixth grounds of demurrer assigned to counts 1, 2, 3 and 5, separately.

2. The first, second, third, fourth and ninth grounds of demurrer assigned to the fifth count.

3. It is alleged in and by the said count that the bonds mentioned therein were sold by the authority of an act of the Legislature mentioned therein, which act of the Legislature made the treasurer and his surety liable for the proceeds of said bonds when received by him; and it is alleged in said count that no money was ever received by said treasurer, or his deputy, as the proceeds of said bonds.

4. It appears in and by said count that Kohn, deputy to said Cochran, represented to the board of revenue of plaintiff that he had received pay for said bonds, when, in fact, he had not, and it does not appear that the surety of said treasurer is by law made responsible for said misrepresentation or the loss occasioned thereby.

5. It appears in and by said count that said Kohn represented to the board of revenue of plaintiff, that he had received payment of said check or demand note, when, in fact, he had not; and it is not alleged that said representation was made by the said Cochran himself, or made by said Kohn by authority of said Cochran, or with the knowledge or consent of said Cochran.

6. Under the special act under which said bonds were issued, the surety of the treasurer is not responsible for misrepresentations made, or loss occasioned by misrepresentations made, as alleged in said count.

70 7. It appears that by the laws of Alabama the duty of the treasurer was to receive, and safely keep, in accordance with the laws, money of the county; and that no duty rested upon him as to money not received by him, and it is alleged in said count that no money was received by said Cochran or by the said Kohn as his deputy.

8. The special act of the Legislature under which the said bonds were issued, made it the duty of the said Cochran only to safely keep all of the proceeds accruing from the sale of said bonds which might come into his hands in his official capacity, the same as other county funds or money in his hands as such treasurer, and no duty rested upon the said Cochran under the said act as to money not received by him; and it is alleged in said count that no money was received by the said Cochran, or by Kohn, his deputy.

9. It does not appear that said Kohn was authorized in said power of attorney by the said Cochran to do anything which the said Cochran could not lawfully do as treasurer, and it is alleged in said count that the said Kohn did do something which the said Cochran could not lawfully do as treasurer.

10. The special act under which the bonds were issued mentioned in said count, made it the duty of the board of revenue of plaintiff to receive money upon the sale of said bonds and to pay the same to said Cochran, and it appears in and by said count that said board of revenue did not receive the money for said bonds and did not pay it to the said Cochran, as treasurer, and it also appears that neither said Cochran nor said Kohn ever received any money for said bonds.

And this defendant demurs to the seventh count and assigns the following grounds, to-wit:

1. Each and every ground of demurrer assigned to the sixth count.

2. It is alleged that an entry was made upon the books of said treasurer, Cochran, acknowledging receipt of said proceeds of said bonds, but it is not alleged that said treasurer
71 or said Kohn in fact received said proceeds or any part of said proceeds.

3. It appears in and by said count that said Kohn committed an unlawful act in misappropriating the funds of the plaintiff by the surrender to said Josiah Morris & Co. of said check, or demand note, and taking credit therefor on the pass book of the treasurer as a general deposit, and no right of action inured to the plaintiff by and through said unlawful act.

4. It is alleged in said count that said Cochran, in full knowledge of the facts touching the sale of said bonds, and of said receipt executed, and of said entries made upon the books, paid sundry checks and warrants out of said alleged [alleged] proceeds of said bonds without objecting to the acts of said deputy, Kohn; but it also appears that said general deposit in said bank, if the matters alleged in said count be held to be a general deposit of the funds of said county, was a conversion of said funds and an unlawful act, and no cause of action inures to the plaintiff from said unlawful act.

5. It appears in and by the allegations of said count that Cochran, through his deputy, misappropriated the funds of the plaintiff by depositing them in bank in a general deposit, and the plaintiff has no right to ratify said illegal act and to base his cause of action thereon.

6. It is difficult to determine upon what breach of the bond plaintiff has attempted to proceed in said count—whether upon said alleged misrepresentation by which said bonds were parted with, whether by the entry made by said Kohn upon the books of said treasurer, or upon the ratification of the acts of the deputy by Cochran, or upon the alleged conversion of the funds of the county or upon the alleged permission of said Cochran to said Kohn to convert the funds of the plaintiff.

7. It does not appear from the said count that any loss resulted to the plaintiff from the matters set up by way of estoppel in the said count.

This defendant demurs to the eighth count, and as grounds of demurrer assigns the following, to-wit:

72 1. Each and every ground of demurrer urged to the seventh count.

2. This defendant is not responsible as surety for the failure of the said Cochran and the failure of his deputy, Kohn, to collect the amount of the said check or demand note.

3. The only obligation resting upon this defendant was that the treasurer should safely keep the money after he received it.

4. By the terms of the act under which said bonds were issued, no duty was placed upon the said Cochran, as treasurer, to collect the proceeds of said bonds; and this defendant is responsible only for the failure of the said Cochran to perform those duties with reference to said proceeds of the bonds fixed on him by the terms of said special act.

5. The duties of the said Cochran, as treasurer, in relation to the proceeds of said bonds were different from the duties imposed upon said Cochran, as treasurer, in reference to the general funds of said county, and this defendant is responsible only for the failure of the said Cochran to perform those duties fixed by the act under which the said bonds were issued.

HILL & HILL,
Attys. for Cochran.

Filed February 3rd, 1904.

J. W. DIMMICK,
Clerk.

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73 DEMURRER OF DEFENDANT, FIDELITY & DEPOSIT CO. OF MARYLAND.

In the Circuit Court of the United States for the Middle District of Alabama.

County of Montgomery
vs.
Fidelity & Deposit Company of Maryland, and John J. Cochran.

Demurrer to the Complaint.

Comes Fidelity & Deposit Co. of Maryland, one of the defendants in the above stated cause, and separately demurs to each count of the complaint, and as grounds of demurrer assigns the following:

1. Said John J. Cochran, as County Treasurer of Montgomery county, is made by law custodian of the funds sought to be recovered herein, and no reason is shown why there should be a recovery of the said funds, or the value thereof, in favor of plaintiff, and no right in the plantiff to recover said funds is shown by said count.

2. It appears in and by the said count that the said John J. Cochran is the treasurer of the said county of Montgomery and as such is entitled to retain the custody of all the funds of the plaintiff.

3. It is not averred or shown by said count that it has ever become the duty of said Cochran, as county treasurer, to pay to plaintiff or anyone else any part of the funds sought to be recovered in said count or any amount on account thereof.

4. It is averred as a conclusion of the pleader that the plaintiff has lost said money by reason of said deposit in said bank and no facts are averred in support of said conclusion.

5. It is not averred or shown that any demand has been made upon the said Cochran in the manner provided by law for the payment of said money, or any part thereof, before the bringing of this suit.

6. That said Cochran is entitled to the possession of said money and is required by law to pay it out upon warrant or warrants properly and legally drawn, and it is not averred or shown that any warrant has been drawn upon him for
74 the payment of any of said money or that he has failed to pay any warrant so drawn upon him as such treasurer.

7. It is averred that the said Cochran deposited the money of the plaintiff in said bank; but for aught that appears in said count, the said Cochran may have drawn said money from the said bank in payment of warrants legally drawn on him as said treasurer.

8. It does not appear that this defendant ever agreed to be responsible for the acts of any deputy of Cochran.

9. It appears that the said Kohn was acting in a dual capacity, viz: agent of Josiah Morris & Co., and deputy of Cochran, and it does not appear that the said Cochran had any notice, knowledge or information that the said Kohn was so acting or had so acted.

This defendant assigns as additional grounds of demurrer to the fifth count of the complaint the following:

1. That it appears from said count that John P. Kohn was not the agent, deputy or attorney in fact of said John J. Cochran, because the power of attorney set forth in said count is illegal and against public policy.

2. That it appears from said count that John P. Kohn was not the agent, deputy or attorney in fact of said John J. Cochran, because the power of attorney set forth in said count is illegal and against public policy, and that the said power of attor-

ney is not given to the said Kohn for the performance of some special act or by reason of any special emergency for and instead of the treasurer, but is substantially a surrender by the treasurer to the said Kohn of the exercise of the functions of his office.

3. It is against public policy for the said Cochran to appoint the said Kohn to perform all of the duties of the office of treasurer and said power of attorney for said reason was void.

4. That the appointment of a deputy, or attorney in fact, or agent, by a county treasurer, is not authorized by any law of the State of Alabama.

5. It was contrary to the law of Alabama for the said Cochran, as county treasurer, to appoint said Kohn as his agent, attorney in fact or deputy, to transact the duties of treasurer of Montgomery county.

75 6. It does not appear from the said count that this defendant agreed or contracted to be responsible for the acts of any deputy of said Cochran, as treasurer.

7. It is alleged that Kohn had the right to receive and receipt for money, but it is not alleged that Kohn had the right to receipt for anything except money.

8. It is not alleged that Kohn was authorized to do all the acts that Cochran could do lawfully, but it is not alleged that Kohn was authorized to do unlawful acts, and the acts of said Kohn alleged, were unlawful.

9. It does not appear that said Kohn or Cochran received any money of the plaintiff.

10. It does not appear that Kohn had any authority to receive or receipt for anything except money in the name of said Cochran.

11. It is not alleged that any money was ever paid for said bonds.

12. It is not alleged that said Cochran knew anything of the actions of said Kohn in giving said receipt without receiving the money mentioned therein.

13. It does not appear that said Cochran authorized said Kohn to make entry on the books of the county treasurer of money received when none had been received.

14. It is not alleged that said Cochran knew anything of said entry upon said treasurer's books, or that he authorized said Kohn to make it.

15. Entry upon the books of said Cochran by said Kohn of the receipt of money where no money was in fact received, did not bind this defendant.

16a. It is alleged that Kohn could only do what Cochran

could lawfully do, and that Kohn issued in the name of Cochran a receipt to said board of revenue as though he had received one hundred [and] eleven thousand, one hundred and nine and 58/100 ($111,109.58) dollars, when he had not received it, and it is not alleged that Cochran could lawfully have issued any such receipt so as to bind his surety.

76 17. It is shown in said count that Cochran authorized Kohn to receipt for only such money as came into the possession of Cochran, and it is not alleged that any money was received, but only the promissory note of Josiah Morris & Co.

As demurrer to the sixth count, this defendant assigns the following grounds, to-wit:

1. The fifth and sixth grounds of demurrer assigned to counts 1, 2, 3 and 5, separately.

2. The first, second, third, fourth and ninth grounds of demurrer assigned to the fifth count.

3. It is alleged in and by the said count that the bonds mentioned therein were sold by the authority of an act of the Legislature mentioned therein, which act of the Legislature made the treasurer and his surety liable for the proceeds of said bonds when received by him; and it is alleged in said count that no money was ever received by said treasurer, or his deputy, as the proceeds of said bonds.

4. It appears in and by said count that Kohn, deputy to said Cochran, represented to the board of revenue of plaintiff that he had received pay for said bonds, when, in fact, he had not, and it does not appear that the surety of said treasurer is by law made responsible for said misrepresentation or the loss occasioned thereby.

5. It appears in and by said count that said Kohn represented to the board of revenue of plaintiff, that he had received payment of said check or demand note, when, in fact, he had not; and it is not alleged that said representation was made by the said Cochran himself, or made by said Kohn by authority of said Cochran, or with the knowledge or consent of said Cochran.

6. Under the special act under which said bonds were issued, the surety of the treasurer is not responsible for misrepresentations made, or loss occasioned by misrepresentations made, as alleged in said count.

77 7. It appears that by the laws of Alabama the duty of the treasurer was to receive, and safely keep, in accordance with the laws, money of the county; and that no duty rested upon him as to money not received by him, and it is al-

leged in said count that no money was received by said Cochran or by the said Kohn as his deputy.

8. The special act of the Legislature under which the said bonds were issued, made it the duty of the said Cochran only to safely keep all of the proceeds accruing from the sale of said bonds which might come into his hands in his official capacity, the same as other county funds or money in his hands as such treasurer, and no duty rested upon the said Cochran under the said act as to money not received by him; and it is alleged in said count that no money was received by the said Cochran, or by Kohn, his deputy.

9. It does not appear that said Kohn was authorized in said power of attorney by the said Cochran to do anything which the said Cochran could not lawfully do as treasurer, and it is alleged in said count that the said Kohn did do something which the said Cochran could not lawfully do as treasurer.

10. The special act under which the bonds were issued mentioned in said count, made it the duty of the board of revenue of plaintiff to receive money upon the sale of said bonds and to pay the same to said Cochran, and it appears in and by said count that said board of revenue did not receive the money for said bonds and did not pay it to the said Cochran, as treasurer, and it also appears that neither said Cochran nor said Kohn ever received any money for said bonds.

And this defendant demurs to the seventh count and assigns the following grounds, to-wit:

1. Each and every ground of demurrer assigned to the sixth count.

2. It is alleged that an entry was made upon the books of said treasurer, Cochran, acknowledging receipt of said proceeds of said bonds, but it is not alleged that said treasurer
78 or said Kohn in fact received said proceeds or any part of said proceeds.

3. It appears in and by said count that said Kohn committed an unlawful act in misappropriating the funds of the plaintiff by the surrender to said Josiah Morris & Co. of said check, or demand note, and taking credit therefor on the pass book of the treasurer as a general deposit, and no right of action inured to the plaintiff by and through said unlawful act.

4. It is alleged in said count that said Cochran, in full knowledge of the facts touching the sale of said bonds, and of said receipt executed, and of said entries made upon the books, paid sundry checks and warrants out of said allegal [alleged] proceeds of said bonds without objecting to the acts of said depu-

ty, Kohn; but it also appears that said general deposit in said bank, if the matters alleged in said count be held to be a general deposit of the funds of said county, was a conversion of said funds and an unlawful act, and no cause of action inures to the plaintiff from said unlawful act.

5. It appears in and by the allegations of said count that Cochran, through his deputy, misappropriated the funds of the plaintiff by depositing them in bank in a general deposit, and the plaintiff has no right to ratify said illegal act and to base his cause of action thereon.

6. It is difficult to determine upon what breach of the bond plaintiff has attempted to proceed in said count—whether upon said alleged misrepresentation by which said bonds were parted with, whether by the entry made by said Kohn upon the books of said treasurer, or upon the ratification of the acts of the deputy by Cochran, or upon the alleged conversion of the funds of the county or upon the alleged permission of said Cochran to said Kohn to convert the funds of the plaintiff.

7. It does not appear from the said count that any loss resulted to the plaintiff from the matters set up by way of estoppel in the said count.

This defendant demurs to the eighth count, and as grounds of demurrer assigns the following, to-wit:

79 1. Each and every ground of demurrer urged to the seventh count.

2. This defendant is not responsible as surety for the failure of the said Cochran and the failure of his deputy, Kohn, to collect the amount of the said check or demand note.

3. The only obligation resting upon this defendant was that the treasurer should safely keep the money after he received it.

4. By the terms of the act under which said bonds were issued, no duty was placed upon the said Cochran, as treasurer, to collect the proceeds of said bonds; and this defendant is responsible only for the failure of the said Cochran to perform those duties with reference to said proceeds of the bonds fixed on him by the terms of said special act.

5. The duties of the said Cochran, as treasurer, in relation to the proceeds of said bonds were different from the duties imposed upon said Cochran, as treasurer, in reference to the general funds of said county, and this defendant is responsible only for the failure of the said Cochran to perform those duties fixed by the act under which the said bonds were issued.

EDGAR H. GANS,
THOS. A. WHELAN,
THOS. H. WATTS,

ALEX. TROY,
Attys. for F. & D. Co. of Md.

Filed February 3rd, 1904.

J. W. DIMMICK,
Clerk.

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80 PLEAS OF JOHN J. COCHRAN.

In the Circuit Court of the United States for the Middle District of Alabama.

County of Montgomery
vs.
John J. Cochran, et al.

Pleas A, B, C, D, E, F, G, H, of John J. Cochran.

Comes John J. Cochran and withdraws each and all of the pleas heretofore filed by this defendant, and for answer to each of the counts of the complaint, separately says:

A. This defendant denies each and every allegation contained in the said count.

B. That at the time the bond sued on was executed by this defendant, the only duties placed by law upon the defendant, Cochran, were the duties as set forth in the general laws of the State of Alabama, and there was no duty on the said Cochran as to the fund sued, for, viz: the proceeds of the one hundred thousand dollars of bonds issued by the plaintiff under the provisions of the act of the Legislature of Alabama, referred to in the fifth count of the complaint in this case, and which was approved December 13th, 1900; that by the fourth section of the said act, it was provided as follows, viz:

"Section 4. Be it further enacted that the board of revenue of said county are hereby authorized to negotiate and sell such bonds as are issued by them by virtue of this act, but said bonds shall not be sold for less than par (100 cents on the dollar) and the proceeds of said bonds shall be paid over to and kept by the treasurer of said county and applied to pay for the building of and improving the public roads of the county, upon a permanent and well considered system, and for the erection of bridges in said county; such use, payment and application of said proceeds to be under the direction and by the authority of the board of

revenue of said county of Montgomery, and the said county treasurer to be responsible for the safe keeping of all the proceeds accruing from the sale of said bonds, which may come into his hands in his official capacity, the same as for other
81 county funds or money in his hands as treasurer, and there shall be no commission paid said county treasurer for disbursing the funds accruing from the sale of the bonds named in this act," and the defendant avers that, in and by the terms of the said act, the said Cochran, as treasurer, was to be held liable on his said bond only for such of the proceeds of the said bonds as came into the hands of the said Cochran, as such treasurer, and this defendant avers that no part of the proceeds of the said bonds ever came into the hands of the said Cochran as treasurer, and no part of the proceeds of the said bonds ever came into the hands of the said treasurer's, Cochran, deputy, Kohn. This defendant further avers that the proceeds of the said bonds, and the duty of the said Cochran, as treasurer, in reference to the same, were governed by the terms of the said fourth section of said act of the Legislature hereinabove set forth, and not by the general law of Alabama applicable to the county treasurer and county office; and that under the terms of the said fourth section this defendant never became liable for any of the proceeds of the said bonds.

C. For a further plea and as answer separately to each of the counts of the complaint, this defendant says: That the money sued for in this case is the proceeds, alleged to have arisen from the sale of $100,000.00 of bonds issued by the county of Montgomery, under and by virtue of an act of the Legislature of Alabama, referred to in the fifth count of the complaint and which was approved December 13th, 1900; that said bonds were awarded to Josiah Morris & Co. upon the agreement to pay in cash therefor the sum of, viz: $111,109.58; that said Josiah Morris & Co. in the purchase and alleged payment for the said bonds, acted through John P. Kohn, their confidential clerk and agent; that, in order to pay for the said bonds, the said Kohn drew a check in the name of Josiah Morris & Co. on Josiah Morris & Company, in the sum of, viz: $111,109.58, payable to the order of said Cochran, as treasurer, and tendered the said check to Allen, clerk of the board of revenue of plaintiff as a compliance with the agreement of the said Josiah
82 Morris & Co. to pay cash for the said bonds, all of which acts on the part of the said Kohn were as the clerk and agent of the said Josiah Morris & Co.; that, the said Allen handed the said check to the said Kohn, as the deputy of

the said Cochran, and demanded a receipt, and the said Kohn executed and delivered to the said Allen the receipt set out in the fifth count of the complaint, and thereupon the said Allen delivered to the said Kohn the said bonds; that the said Kohn, in giving the said receipt, purported to act as the deputy of the said Cochran, but without authority to do so in that manner, and in receiving the said bonds from the said Allen, the said Kohn acted as the clerk and agent of the said Josiah Morris & Co.; that after the receipt of the said check by the said Kohn from the said Allen, the said Kohn took the said check and delivered the same to said Josiah Morris & Co. as a deposit to the credit of the said Cochran, as treasurer, and the said Kohn charged the said Cochran, on his books, as treasurer, with the receipt of the said sum of $111,109.58, as though the said sum had been actually received in money by the said Cochran, as treasurer, or by his deputy, Kohn, for him, but defendant avers that no money and no proceeds of the sale of the said bonds, except the said check, was ever received by the said Cochran, as treasurer, or by his said deputy, Kohn, and defendant avers that at the time the said check was given the said Josiah Morris & Co. were insolvent and the said check worthless, and that the said Josiah Morris & Co. ceased to do business and closed their said bank within a short time after the deposit of the said check, viz: within eighteen days. Defendant further avers that when the said Kohn received the said check from the said Allen, when the said Kohn delivered the said check to the said Josiah Morris & Co. and when he made the said entry on the books of the said treasurer, the said Kohn purported to act as the deputy of said Cochran, but defendant avers that said Kohn had no authority to act in the manner he did. This defendant further avers that at the time of obtaining the award of said bonds to Josiah Morris & Co. at the time Kohn, as agent for Josiah Morris & Co., tendered the check to Allen; at the time he received the bonds, and at the time he deposited the check, and at the time he made
83 the entry on the books of the treasurer as though he had actually received said $111,109.58, the said Kohn well knew that Josiah Morris & Co. were insolvent and utterly unable to pay the said check; that the said check was worthless and the said Kohn in charging the amount of the said check upon the books of the said treasurer, acted in bad faith to said treasurer and without any authority from said treasurer to so act. This defendant further avers that at the respective times mentioned herein the fact of the insolvency of the said Josiah Morris & Co. was utterly unknown to the said Cochran, treasurer, and the said Cochran had no notice, knowledge or informa-

tion of any of the said acts of the said Kohn done by the said Kohn while he purported to act as the deputy of the said Cochran as hereinbefore stated, until after the failure of the said Josiah Morris & Co., and none of the said acts of the said Kohn were ever ratified or confirmed by the said Cochran with knowledge of the said insolvency. Wherefore, this defendant avers that said Kohn in the transaction hereinbefore stated, of accepting the check drawn by himself on the said Josiah Morris & Co. in alleged payment for the said bonds, and in charging on the books of the said Cochran the receipt of the amount of the said check as though the money therefor had actually been received by the said Cochran, as treasurer, or by the said Kohn, as his deputy, was not legally the agent or deputy of said Cochran, authorized to bind him, the said Cochran, or the surety on his bond with relation to any of the said acts hereinbefore stated as having been done by him relative to the taking of the said check which he deposited, or the making of said entry in said treasury books. This defendant denies any liability based upon the said acts of the said Kohn.

D. That the money sought to be recovered in this suit is the proceeds of an alleged sale of $100,000.00 of bonds issued by the plaintiff and agreed to be sold by the plaintiff to Josiah Morris & Co. And this defendant avers that no money was ever paid for said bonds, and that no money arising from the sale of said bonds was ever received by the said Cochran, as treasurer, or by any one acting under authority of the said Cochran, as
84 treasurer.

And this defendant further avers that the act of the Legislature of Alabama, approved December 13th, 1900, the fourth section of which is quoted in plea B, authorizing the sale of said bonds, required that said bonds should not be sold for less than par, in money, and required that said money when paid for said bonds, should be paid to said Cochran, as treasurer, to be used under the direction and by the authority of the board of revenue of plaintiff in building and improving roads and erecting bridges. And this defendant further avers that the facts in relation to the said sale of said bonds, and the alleged receipt by the said Cochran of the proceeds of said bonds, are not as alleged in either of the courts [counts] of the complaint, but are in substance, as follows, to-wit: The bonds were awarded to Josiah Morris & Co. by the board of revenue of plaintiff on, to-wit: the 8th day of January, 1901, at and for the sum of $111,109.58, to be paid in cash upon the delivery of said bonds; that prior to the said 8th day of January, 1901, one John P. Kohn had been

by the said Cochran appointed as his, the said Cochran's, deputy under a power of attorney, which is in words and figures in substance, as follows:

State of Alabama,
Montgomery County.

I, John J. Cochran, of said county, hereby constitute and appoint John P. Kohn of Montgomery, Alabama, my true and lawful attorney, to receive and receipt for in my name, all moneys coming into my possession as treasurer of the county of Montgomery, Alabama, and in my name, as treasurer, to pay out all moneys as required by law to be paid by me upon checks signed by the clerk of the board of revenue of said Montgomery county; and further to make reports, keep all books required by law to be made or kept by me as such county treasurer, and to do and perform all acts and things I might lawfully do in my own name, as such county treasurer, and I do hereby ratify and confirm all the acts and things that may be done by the said John P. Kohn acting as my agent under the authority of this power, as if the same were done in person by myself.

In witness whereof I hereunto set my hand and affix my seal this September 1st, A. D. 1900.

JOHN J. COCHRAN, [L. S.]
As Treasurer of Montgomery County.

85 And the defendant further avers that the said Kohn had no other authority from the said Cochran as such treasurer, than is shown by said power of attorney. This defendant further avers that on the said 8th day of January, 1901, the said Kohn was still such deputy; with the powers only as shown by the said power of attorney; and the said Kohn was on, and had been for some years prior to the 8th day of January, 1901, the confidential agent and clerk of said Josiah Morris & Co.; that the said Kohn acted for the said Josiah Morris & Co. in and about the alleged purchase of the said bonds from the plaintiff, and that in alleged payment to plaintiff for said bonds the said Kohn, acting for the said Josiah Morris & Co., drew a check on, to-wit: the 8th day of January, 1901, in name of, and on said Josiah Morris & Co. in the sum of $111,109.58 payable to the said Cochran as treasurer, and handed the same to one Allen, who was the clerk of the said board of revenue of plaintiff, and who knew said Kohn was in the transaction herein mentioned, acting in the dual capacity of clerk to Josiah Morris & Co. and deputy to the said Cochran; and that said Allen acted for the plaintiff in the

alleged sale of said bonds. This defendant further avers that upon the said check being handed to him, said Allen, by the said Kohn, the said Allen immediately handed the said check back to the said Kohn, and the said Kohn in exchange for said check then and there handed to said Allen the receipt set forth in the fifth count of the complaint, and thereupon the said Allen delivered the said bonds to the said Kohn as the clerk for the said Josiah Morris & Co., well knowing that nothing had been received as proceeds for the sale of said bonds except the aforesaid check in exchange for which the aforesaid receipt was given. And this defendant avers that no money was ever received by the said Kohn as such deputy of the said Cochran when he gave the said receipt. This defendant further avers that the said Allen knew that the said Kohn had no lawful authority to receive and receipt for said check in the name of said Cochran as treasurer, as though the said check were money; that after the said check had been handed back to the said Kohn by the said Allen, the said Kohn took the said
86 check and handed it back to the said Josiah Morris & Co. on, to-wit: the 8th day of January, 1901, and asked the said Josiah Morris & Co. to give to the said Cochran a credit on the books of Josiah Morris & Co. for the amount of the said check,and the said Kohn wrote or caused to be written upon the books of the said Josiah Morris & Co. an entry purporting to credit the said Cochran as treasurer on the books of said Josiah Morris & Co. with the sum of $111,109.58. And this defendant avers that in no other way than as alleged above has anything been received from the sale of said bonds by said Cochran as treasurer. And this defendant avers that the said act authorizing the issuance and the sale of said bonds, did not make the bonds of said Cochran liable for anything except money which actually came into the hands of said Cochran as treasurer, as the proceeds of the said bonds.

E. That the money sought to be recovered in this suit is the proceeds of an alleged sale of $100,000.00 of bonds issued by the plaintiff, and agreed to be sold by the plaintiff to Josiah Morris & Co. This defendant avers that no money arising from the sale of said bonds ever came into the hands of the said Cochran as treasurer or into the hands of anyone acting under authority of said Cochran as treasurer. And this defendant avers that the act authorizing the sale of said bonds required that said bonds should not be sold for less than par in money, and required that said money when paid for said bonds should be paid to said Cochran as treasurer, to be used under direction

and by the authority of the board of revenue of plaintiff in building and improving roads and erecting bridges. And this defendant avers the facts in relation to the alleged sale of said bonds, and the alleged receipt by the said Cochran of the proceeds of said bonds, are not as alleged in either of the said counts, and the said Cochran did not convert any of the proceeds of the said bonds, but the facts in relation to the sale of said bonds, and the alleged receipt of the proceeds thereof by the said Cochran as treasurer are in substance as follows, to-wit: That the said bonds were awarded to Josiah Morris & Co. by the board of revenue of plaintiff on, to-wit: the 8th day of January, 1901, at and for the sum of $111,109.58, to be paid in cash upon the delivery of said bonds; that prior to the said 8th day of January, 1901, one John P. Kohn had been, by the said Cochran, appointed as his, said Cochran's, deputy with the authority only as shown by the power of attorney set out in the fifth count of the complaint, and on the 8th day of January, 1901, the said Kohn was still such deputy with the powers only as shown by the said power of attorney. And this defendant further avers that the said Kohn was on, and had been for some years prior to the 8th day of January, 1901, the confidential agent or clerk of said Josiah Morris & Co.; that the said Kohn acted for the said Josiah Morris & Co. in and about the alleged purchase of the said bonds from plaintiff, and that in alleged payment to plaintiff for said bonds, the said Kohn acting for the said Josiah Morris & Co. drew a check on, to-wit: the 8th day of January, 1901, in the name of and on the said Josiah Morris & Co. in the sum of $111,109.58, payable to the said Cochran as treasurer, and handed the said check to one Allen, who was a clerk of the said board of revenue of the plaintiff, and who knew the said Kohn was in the transaction herein mentioned acting in the dual capacity of clerk to Josiah Morris & Co. and deputy to the said Cochran; defendant further avers that said Allen acted for the plaintiff in the alleged sale of said bonds; that the said Allen immediately handed the said check back to the said Kohn and the said Kohn in exchange for the said check then and there handed the said Allen the receipt set forth in the fifth count of the complaint; that the said Allen delivered the said bonds to said Kohn as clerk of the said Josiah Morris & Co., well knowing that nothing had been received as proceeds for the sale of said bonds except the aforesaid check in exchange for which the aforesaid receipt was given; and this defendant avers that nothing was received by the said Kohn as the consideration for said receipt

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except the said check; and that the said Kohn did not receive any money upon the execution of the said receipt or before or after the execution of the said receipt. And the defendant further avers that the said Allen knew that the said Kohn had no lawful authority to receive and receipt for the said check in the name of the said Cochran as money;

88 that upon the said check being handed back to the said Kohn by the said Allen, and after the said Kohn had executed the receipt aforesaid, the said Kohn took the said check and deposited it in the bank of the said Josiah Morris & Co. on, to-wit: the said 8th day of January, 1901, and wrote or caused to be written upon the books of the said Josiah Morris & Co. an entry of $111,109.58, evidencing a credit to the said Cochran by the said Josiah Morris & Co. of the last mentioned sum, and in no other way than alleged above has anything been received from the sale of said bonds by the said Cochran as treasurer, or by anyone acting under authority from said Cochran as treasurer; defendant further avers that the said check drawn by the said Kohn in the name of, and on Josiah Morris & Co. was in law nothing but the promissory note of the said Josiah Morris & Co. and that when the said Kohn deposited the said alleged check with the said Josiah Morris & Co., and the said Josiah Morris & Co. in exchange for said alleged check made an entry upon their said books to the credit of the said Cochran, the said Josiah Morris & Co. simply exchanged their promissory note in the shape of the check drawn by the said Kohn, for another promise to pay, evidenced by the entry of the said credit on the said books, and therefore this defendant says that the said check was never paid by the said Josiah Morris & Co.; this defendant further avers that the said money agreed to be paid by the said Josiah Morris & Co. for the said bonds was never paid in any manner; and that no proceeds of the said bonds ever came into the hands of the said Cochran as such treasurer, or into the hands of anyone acting under authority of the said Cochran. And this defendant further avers that at the time the beforesaid check was drawn and delivered to the said Allen, and at the time the said bonds were delivered to the said Kohn, and at the time the check was deposited with Josiah Morris & Co. to the credit of the said Cochran as treasurer, the said Josiah Morris & Co. were totally insolvent and totally unable to pay the said check; all of which facts were well known to the

89 said Kohn, and were unknown to the said Cochran; and the said Cochran had no knowledge of the acts of his said deputy Kohn in the premises until after the failure of

the said Josiah Morris & Co., which occurred very shortly afterwards, to-wit: within eighteen days thereafter; wherefore this defendant says that no liability has accrued against the said Cochran or his surety for, or on account of the said acts of the said Kohn.

F. For further plea separately filed to each of the counts of the said complaint, this defendant says, this defendant adopts and reiterates each and every allegation contained in plea E, as though specially set out herein, and in addition thereto avers that this defendant never contracted or agreed to be responsible for the acts of the said Kohn or any deputy of the said Cochran, but only for the acts of the said Cochran himself; and this defendant further avers that it had no knowledge or information or notice until after the failure of the said Josiah Morris & Co. of any of the matters alleged in any of the said counts as to the appointment of the said Kohn as deputy of the said Cochran or of the acts of said Kohn as such deputy as alleged in either of said counts.

G. For further plea separately filed to each of the counts of the complaint, this defendant says, that the money sought to be recovered in this suit is the sum of $111,109.58, alleged to be the proceeds of the sale of $100,000.00 of bonds issued by the plaintiff and sold by it to Josiah Morris & Co. This defendant avers that no money arising from the sale of such bonds was ever received by the said Cochran as treasurer, or by anyone acting under authority of the said Cochran as treasurer; and this defendant avers the facts in relation to the sale of said bonds, and the alleged receipt by the said Cochran of the proceeds of the sale of said bonds is not as alleged in the 5, 6, 7 and 8 counts, but said facts are in subetance as follows:

That the said Cochran whilst treasurer, delivered to the said John P. Kohn the papers set out as power of attorney in the fifth count, and under said authority and no other the said Kohn purported to act, and did act as the deputy of the said Cochran; that the said Kohn was on the 8th day of
90 January, 1901, and until the 25th day of January, 1901, an employee of the banking house of Josiah Morris & Co.; that under the authority of the act approved December 13th, 1900, a copy of the fourth section of which is set forth in plea B and made a part thereof as though set out specifically herein—the board of revenue of Montgomery County issued and negotiated the sale on the 8th day of January, 1901, of $100,000.00 of road and bridge bonds to the said

Josiah Morris & Co. at and for the sum of $111,109.58, the said Kohn representing the said Josiah Morris & Co. tendered to Charles A. Allen, clerk of the board of revenue of said county, in payment of said bonds a check in the sum of $111,109.58, dated January 8th, 1901, payable to the order of John J. Cochran, County Treasurer, and drawn in the name of Josiah Morris & Co. upon themselves; whereupon the said Allen asked said Kohn for a receipt from the county treasurer; that thereupon the said Kohn left the office of the board of revenue and returned shortly thereafter with the receipt set out in the fifth count of the complaint, and handed the same to the said Allen; and thereupon the said Allen allowed the said Kohn to retain possession of the said check, and handed the said Kohn the said bonds, the said Allen well knowing that nothing had been received by the said Kohn or Cochran, as proceeds of said bonds except the said check above referred to; and this defendant avers that the said Kohn as the deputy of the said Cochran, had not, and the said Cochran had not, received anything as the proceeds of the said bonds before, at the time of, or after the execution of the said receipt except the said check above referred to; and defendant avers that no money was ever collected upon said check, and that in no other way than substantially above alleged has anything been received by said Cochran, treasurer, or by anyone acting under his authority, as the proceeds of the sale of said bonds.

H. For further answer to each of the counts of the said complaint this defendant separately says that continuously since, to-wit: the 24th day of August, 1900, the defendant Cochran has been, and is now, the treasurer of the plaintiff, and by the laws of the State of Alabama has been continuously since, to-
91 wit: the 24th day of August, 1900, and is now the sole custodian of the money belonging to the plaintiff, and has had during the period aforesaid, and has now, the right to hold and keep the money of the plaintiff until such time as the same is or shall be legally demanded of him as said treasurer, or until the termination of his term of office as such treasurer, which he alleges will not occur until the .... day of November, 1904. And this defendant avers that there never has been any demand made upon the said Cochran or his surety in the manner provided by law for the payment of any part of the money sued for in this suit. And this defendant avers that the plaintiff has no legal right to any part of the money sued for, and no right to have a judgment against said Cochran or

his surety therefor. Wherefore this defendant says the plaintiff cannot recover.

HILL & HILL,
Attys. for Cochran.

Filed Feby. 3, 1904.

J. W. DIMMICK, Clerk.

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92 PLEAS OF FIDELITY & DEPOSIT COMPANY.

In the Circuit Court of the United States for the Middle District of Alabama.

County of Montgomery
vs.
John J. Cochran, et al.

Pleas A, B, C, D, E, F, G, H, of Fidelity & Deposit Co. of Maryland.

Comes Fidelity & Deposit Company of Maryland and withdraws each and all of the pleas heretofore filed by this defendant, and for answer to each of the counts of the complaint, separately says:

A. This defendant denies each and every allegation contained in the said count.

B. That at the time the bond sued on was executed by this defendant, the only duties placed by law upon the defendant, Cochran, were the duties as set forth in the general laws of the State of Alabama, and there was no duty on the said Cochran as to the fund sued for, viz: the proceeds of the one hundred thousand dollars of bonds issued by the plaintiff under the provisions of the act of the Legislature of Alabama, referred to in the fifth count of the complaint in this case, and which was approved December 13th, 1900; that by the fourth section of the said act, it was provided as follows, viz:

"Section 4. Be it further enacted that the board of revenue of said county are hereby authorized to negotiate and sell such bonds as are issued by them by virtue of this act, but said bonds shall not be sold for less than par (100 cents on the dollar) and the proceeds of said bonds shall be paid over to and kept by the treasurer of said county and applied to pay for the building of

and improving the public roads of the county, upon a permanent and well considered system, and for the erection of bridges in said county; such use, payment and application of said proceeds to be under the direction and by the authority of the board of revenue of said county of Montgomery, and the said county treasurer to be responsible for the safe keeping of all the proceeds accruing from the sale of said bonds, which may come into his hands in his official capacity, the same as for other
93 county funds or money in his hands as treasurer, and there shall be no commission paid said county treasurer for disbursing the funds accruing from the sale of the bonds named in this act," and the defendant avers that, in and by the terms of the said act, the said Cochran, as treasurer, was to be held liable on his said bond only for such of the proceeds of the said bonds as came into the hands of the said Cochran, as such treasurer, and this defendant avers that no part of the proceeds of the said bonds ever came into the hands of the said Cochran as treasurer, and no part of the proceeds of the said bonds ever came into the hands of the said treasurer, Cochran's, deputy, Kohn. This defendant further avers that the proceeds of the said bonds, and the duty of the said Cochran, as treasurer, in reference to the same, were governed by the terms of the said fourth section of said act of the Legislature hereinabove set forth, and not by the general law of Alabama applicable to the county treasurer and county office; and that under the terms of the said fourth section this defendant never became liable for any of the proceeds of the said bonds.

C. For a further plea and as answer separately to each of the counts of the complaint, this defendant says: That the money sued for in this case is the proceeds, alleged to have arisen from the sale of $100,000.00 of bonds issued by the county of Montgomery, under and by virtue of an act of the Legislature of Alabama, referred to in the fifth count of the complaint and which was approved December 13th, 1900; that said bonds were awarded to Josiah Morris & Co. upon the agreement to pay in cash therefor the sum of, viz: $111,109.58; that said Josiah Morris & Co. in the purchase and alleged payment for the said bonds, acted through John P. Kohn, their confidential clerk and agent; that, in order to pay for the said bonds, the said Kohn drew a check in the name of Josiah Morris & Co. on Josiah Morris & Company, in the sum of, viz: $111,109.58, payable to the order of said Cochran, as treasurer, and tendered the said check to Allen, clerk of the board of revenue of plaintiff as a

compliance with the agreement of the said Josiah
94 Morris & Co. to pay cash for the said bonds, all of which acts on the part of the said Kohn were as the clerk and agent of the said Josiah Morris & Co.; that, the said Allen handed the said check to the said Kohn, as the deputy of the said Cochran, and demanded a receipt, and the said Kohn executed and delivered to the said Allen the receipt set out in the fifth count of the complaint, and thereupon the said Allen delivered to the said Kohn the said bonds; that the said Kohn, in giving the said receipt, purported to act as the deputy of the said Cochran, but without authority to do so in that manner, and in receiving the said bonds from the said Allen, the said Kohn acted as the clerk and agent of the said Josiah Morris & Co.; that after the receipt of the said check by the said Kohn from the said Allen, the said Kohn took the said check and delivered the same to said Josiah Morris & Co. as a deposit to the credit of the said Cochran, as treasurer, and the said Kohn charged the said Cochran, on his books, as treasurer, with the receipt of the said sum of $111,109.58, as though the said sum had been actually received in money by the said Cochran, as treasurer, or by his deputy, Kohn, for him, but defendant avers that no money and no proceeds of the sale of the said bonds, except the said check, was ever received by the said Cochran, as treasurer, or by his said deputy, Kohn, and defendant avers that at the time the said check was given the said Josiah Mo[illegible]s & Co. were insolvent and the said check worthless, and that [illegible] said Josiah Morris & Co. ceased to do business and closed their said bank within a short time after the deposit of the said check, viz: within eighteen days. Defendant further avers that when the said Kohn received the said check from the said Allen, when the said Kohn delivered the said check to the said Josiah Morris & Co. and when he made the said entry on the books of the said treasurer, the said Kohn purported to act as the deputy of said Cochran, but defendant avers that said Kohn had no authority to act in the manner he did. This defendant further avers that at the time of obtaining the award of said bonds to Josiah Morris & Co. at the time Kohn, as agent for Josiah Morris & Co., tendered the check to Allen; at the time he received the bonds, and at the
95 time he deposited the check, and at the time he made the entry on the books of the treasurer as though he had actually received said $111,109.58, the said Kohn well knew that Josiah Morris & Co. were insolvent and utterly unable to pay the said check; that the said check was worthless and the said Kohn in charging the amount of the said check upon the books of the said treasurer, acted in bad faith to said

treasurer and without any authority from said treasurer to so act. This defendant further avers that at the respective times mentioned herein the fact of the insolvency of the said Josiah Morris & Co. was utterly unknown to the said Cochran, treasurer, and the said Cochran had no notice, knowledge or information of any of the said acts of the said Kohn done by the said Kohn while he purported to act as the deputy of the said Cochran as hereinbefore stated, until after the failure of the said Josiah Morris & Co., and none of the said acts of the said Kohn were ever ratified or confirmed by the said Cochran with knowledge of the said insolvency. Wherefore, this defendant avers that said Kohn in the transaction hereinbefore stated, of accepting the check drawn by himself on the said Josiah Morris & Co. in alleged payment for the said bonds, and in charging on the books of the said Cochran the receipt of the amount of the said check as though the money therefor had actually been received by the said Cochran, as treasurer, or by the said Kohn, as his deputy, was not legally the agent or deputy of said Cochran, authorized to bind him, the said Cochran, or the surety on his bond with relation to any of the said acts hereinbefore stated as having been done by him relative to the taking of the said check which he deposited, or the making of said entry in said treasury books. This defendant denies any liability based upon the said acts of the said Kohn.

D. That the money sought to be recovered in this suit is the proceeds of an alleged sale of $100,000.00 of bonds issued by the plaintiff and agreed to be sold by the plaintiff to Josiah Morris & Co. And this defendant avers that no money was ever paid for said bonds, and that no money arising from the sale of said bonds was ever received by the said Cochran, as treasurer, or by any one acting under authority of the said Cochran, as
96 treasurer.

And this defendant further avers that the act of the Legislature of Alabama, approved December 13th, 1900, the fourth section of which is quoted in plea B, authorizing the sale of said bonds, required that said bonds should not be sold for less than par, in money, and required that said money when paid for said bonds, should be paid to said Cochran, as treasurer, to be used under the direction and by authority of the board of revenue of plaintiff in building and improving roads and erecting bridges. And this defendant further avers that the facts in relation to the said sale of said bonds, and the alleged receipt by the said Cochran of the proceeds of said bonds, are not as alleged in either of the counts of the complaint, but are in

substance, as follows, to-wit: The bonds were awarded to Josiah Morris & Co. by the board of revenue of plaintiff on, to-wit: the 8th day of January, 1901, at and for the sum of $111,109.58, to be paid in cash upon the delivery of said bonds; that prior to the said 8th day of January, 1901, one John P. Kohn had been by the said Cochran appointed as his, the said Cochran's, deputy under a power of attorney, which is in words and figures in substance, as follows:

State of Alabama,
Montgomery County.

I, John J. Cochran, of said county, hereby constitute and appoint John P. Kohn of Montgomery, Alabama, my true and lawful attorney, to receive and receipt for in my name, all moneys coming into my possession as treasurer of the county of Montgomery, Alabama, and in my name, as treasurer, to pay out all moneys as required by law to be paid by me upon checks signed by the clerk of the board of revenue of said Montgomery county; and further to make reports, keep all books required by law to be made or kept by me as such county treasurer, and to do and perform all acts and things I might lawfully do in my own name, as such county treasurer, and I do hereby ratify and confirm all the acts and things that may be done by the said John P. Kohn acting as my agent under the authority of this power, as if the same were done in person by myself.

In witness whereof I hereunto set my hand and affix my seal this September 1st, A. D. 1900.

JOHN J. COCHRAN, [L. S.]
As Treasurer of Montgomery County.

97 And the defendant further avers that the said Kohn had no other authority from the said Cochran as such treasurer, than is shown by said power of attorney. This defendant further avers that on the said 8th day of January, 1901, the said Kohn was still such deputy; with the powers only as shown by the said power of attorney; and the said Kohn was on, and had been for some years prior to the 8th day of January, 1901, the confidential agent and clerk of said Josiah Morris & Co.; that the said Kohn acted for the said Josiah Morris & Co. in and about the alleged purchase of the said bonds from the plaintiff, and that in alleged payment to plaintiff for said bonds the said Kohn, acting for the said Josiah Morris & Co., drew a check on, to-wit: the 8th day of January, 1901, in name of, and on said Josiah Morris & Co. in the sum of $111,109.58 payable to the said Cochran as

treasurer, and handed the same to one Allen, who was the clerk of the said board of revenue of plaintiff, and who knew said Kohn was in the transaction herein mentioned, acting in the dual capacity of clerk to Josiah Morris & Co. and deputy to the said Cochran; and that said Allen acted for the plaintiff in the alleged sale of said bonds. This defendant further avers that upon the said check being handed to him, said Allen, by the said Kohn, the said Allen immediately handed the said check back to the said Kohn, and the said Kohn in exchange for said check then and there handed to said Allen the receipt set forth in the fifth count of the complaint, and thereupon the said Allen delivered the said bonds to the said Kohn as the clerk for the said Josiah Morris & Co., well knowing that nothing had been received as proceeds for the sale of said bonds except the aforesaid check in exchange for which the aforesaid receipt was given. And this defendant avers that no money was ever received by the said Kohn as such deputy of the said Cochran when he gave the said receipt. This defendant further avers that the said Allen knew that the said Kohn had no lawful authority to receive and receipt for said check in the name of said Cochran as treasurer, as though the said check were money; that after the said check had been handed back to the said Kohn by the said Allen, the said Kohn took the said
98 check and handed it back to the said Josiah Morris & Co. on, to-wit: the 8th day of January, 1901, and asked the said Josiah Morris & Co. to give to the said Cochran a credit on the books of Josiah Morris & Co. for the amount of the said check,and the said Kohn wrote or caused to be written upon the books of the said Josiah Morris & Co. an entry purporting to credit the said Cochran as treasurer on the books of said Josiah Morris & Co. with the sum of $111,109.58. And this defendant avers that in no other way than as alleged above has anything been received from the sale of said bonds by said Cochran as treasurer. And this defendant avers that the said act authorizing the issuance and the sale of said bonds, did not make the bonds of said Cochran liable for anything except money which actually came into the hands of said Cochran as treasurer, as the proceeds of the said bonds.

E. That the money sought to be recovered in this suit is the proceeds of an alleged sale of $100,000.00 of bonds issued by the plaintiff, and agreed to be sold by the plaintiff to Josiah Morris & Co. This defendant avers that no money arising from the sale of said bonds ever came into the hands of the said Cochran as treasurer or into the hands of anyone acting under

authority of said Cochran as treasurer. And this defendant avers that the act authorizing the sale of said bonds required that said bonds should not be sold for less than par in money, and required that said money when paid for said bonds should be paid to said Cochran as treasurer, to be used under direction and by the authority of the board of revenue of plaintiff in building and improving roads and erecting bridges. And this defendant avers the facts in relation to the alleged sale of said bonds and the alleged receipt by the said Cochran of the proceeds of said bonds, are not as alleged in either of the said counts, and the said Cochran did not convert any of the proceeds of the said bonds, but the facts in relation to the sale of said bonds, and the alleged receipt of the proceeds thereof by the said Cochran as treasurer are in substance as follows, to-wit: That the said bonds were awarded to Josiah Morris & Co. by the board of revenue of plaintiff on, to-wit: the 8th day of January, 1901, at and for the sum of $11,109.58, to be paid in cash upon the delivery of said bonds; that prior to the said 8th day of January, 1901, one John P. Kohn had been, by the said Cochran, appointed as his, said Cochran's, deputy with the authority only as shown by the power of attorney set out in the fifth count of the complaint, and on the 8th day of January, 1901, the said Kohn was still such deputy with the powers only as shown by the said power of attorney. And this defendant further avers that the said Kohn was on, and had been for some years prior to the 8th day of January, 1901, the confidential agent or clerk of said Josiah Morris & Co.; that the said Kohn acted for the said Josiah Morris & Co. in and about the alleged purchase of the said bonds from plaintiff, and that in alleged payment to plaintiff for said bonds, the said Kohn acting for the said Josiah Morris & Co. drew a check on, to-wit: the 8th day of January, 1901, in the name of and on the said Josiah Morris & Co. in the sum of $111,109.58, payable to the said Cochran as treasurer, and handed the said check to one Allen, who was a clerk of the said board of revenue of the plaintiff, and who knew the said Kohn was in the transaction herein mentioned acting in the dual capacity of clerk to Josiah Morris & Co. and deputy to the said Cochran; defendant further avers that said Allen acted for the plaintiff in the alleged sale of said bonds; that the said Allen immediately handed the said check back to the said Kohn and the said Kohn in exchange for the said check then and there handed the said Allen the receipt set forth in the fifth count of the complaint; that the said Allen delivered the said bonds to said Kohn

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as clerk of the said Josiah Morris & Co., well knowing that nothing had been received as proceeds for the sale of said bonds except the aforesaid check in exchange for which the aforesaid receipt was given; and this defendant avers that nothing was received by the said Kohn as the consideration for said receipt except the said check; and that the said Kohn did not receive any money upon the execution of the said receipt or before or after the execution of the said receipt. And the defendant further avers that the said Allen knew that the said Kohn had no lawful authority to receive and receipt for the said check in the name of the said Cochran as money;
100 that upon the said check being handed back to the said Kohn by the said Allen, and after the said Kohn had executed the receipt aforesaid, the said Kohn took the said check and deposited it in the bank of the said Josiah Morris & Co. on, to-wit: the said 8th day of January, 1901, and wrote or caused to be written upon the books of the said Josiah Morris & Co. an entry of $111,109.58, evidencing a credit to the said Cochran by the said Josiah Morris & Co. of the last mentioned sum, and in no other way than alleged above has anything been received from the sale of said bonds by the said Cochran as treasurer, or by anyone acting under authority from said Cochran as treasurer; defendant further avers that the said check drawn by the said Kohn in the name of, and on Josiah Morris & Co. was in law nothing but the promissory note of the said Josiah Morris & Co.; and that when the said Kohn deposited the said alleged check with the said Josiah Morris & Co., and the said Josiah Morris & Co. in exchange for said alleged check made an entry upon their said books to the credit of the said Cochran, the said Josiah Morris & Co. simply exchanged their promissory note in the shape of the check drawn by the said Kohn, for another promise to pay, evidenced by the entry of the said credit on the said books, and therefore this defendant says that the said check was never paid by the said Josiah Morris & Co.; this defendant further avers that the said money agreed to be paid by the said Josiah Morris & Co. for the said bonds was never paid in any manner; and that no proceeds of the said bonds ever came into the hands of the said Cochran as such treasurer, or into the hands of anyone acting under authority of the said Cochran. And this defendant further avers that at the time the beforesaid check was drawn and delivered to the said Allen, and at the time the said bonds were delivered to the said Kohn, and at the time the check was deposited with Josiah Morris & Co. to

the credit of the said Cochran as treasurer, the said Josiah Morris & Co. were totally insolvent and totally unable to pay the said check; all of which facts were well known to the
101 said Kohn, and were unknown to the said Cochran; and the said Cochran had no knowledge of the acts of his said deputy Kohn in the premises until after the failure of the said Josiah Morris & Co., which occurred very shortly afterwards, to-wit: within eighteen days thereafter; wherefore this defendant says that no liability has accrued against the said Cochran or his surety for, or on account of the said acts of the said Kohn.

F. For further plea separately filed to each of the counts of the said complaint, this defendant says, this defendant adopts and reiterates each and every allegation contained in plea E, as though specially set out herein, and in addition thereto avers that this defendant never contracted or agreed to be responsible for the acts of the said Kohn or any deputy of the said Cochran, but only for the acts of the said Cochran himself; and this defendant further avers that it had no knowledge or information or notice until after the failure of the said Josiah Morris & Co. of any of the matters alleged in any of the said counts as to the appointment of the said Kohn as deputy of the said Cochran or of the acts of said Kohn as such deputy as alleged in either of said counts.

G. For further plea separately filed to each of the counts of the complaint, this defendant says, that the money sought to be recovered in this suit is the sum of $111,109.58, alleged to be the proceeds of the sale of $100,000.00 of bonds issued by the plaintiff and sold by it to Josiah Morris & Co. This defendant avers that no money arising from the sale of such bonds was ever received by the said Cochran as treasurer, or by anyone acting under authority of the said Cochran as treasurer; and this defendant avers the facts in relation to the sale of said bonds, and the alleged receipt by the said Cochran of the proceeds of the sale of said bonds is not as alleged in the 5, 6, 7 and 8 counts, but said facts are in substance as follows:

That the said Cochran whilst treasurer, delivered to the said John P. Kohn the papers set out as power of attorney in the fifth count, and under said authority and no other the said Kohn purported to act, and did act as the deputy of the said Cochran; that the said Kohn was on the 8th day of
102 January, 1901, and until the 25th day of January, 1901, an employee of the banking house of Josiah

Morris & Co.; that under the authority of the act approved December 13th, 1900, a copy of the fourth section of which is set forth in plea B and made a part thereof as though set out specifically herein—the board of revenue of Montgomery County issued and negotiated the sale on the 8th day of January, 1901, of $100,000.00 of road and bridge bonds to the said Josiah Morris & Co. at and for the sum of $111,109.58, the said Kohn representing the said Josiah Morris & Co. tendered to Charles A. Allen, clerk of the board of revenue of said county, in payment of said bonds a check in the sum of $111,109.58, dated January 8th, 1901, payable to the order of John J. Cochran, County Treasurer, and drawn in the name of Josiah Morris & Co. upon themselves; whereupon the said Allen asked said Kohn for a receipt from the county treasurer; that thereupon the said Kohn left the office of the board of revenue and returned shortly thereafter with the receipt set out in the fifth count of the complaint, and handed the same to the said Allen; and thereupon the said Allen allowed the said Kohn to retain possession of the said check, and handed the said Kohn the said bonds, the said Allen well knowing that nothing had been received by the said Kohn or Cochran, as proceeds of said bonds except the said check above referred to; and this defendant avers that the said Kohn as the deputy of the said Cochran, had not, and the said Cochran had not, received anything as the proceeds of the said bonds before, at the time of, or after the execution of the said receipt except the said check above referred to; and defendant avers that no money was ever collected upon said check, and that in no other way than substantially above alleged has anything been received by said Cochran, treasurer, or by anyone acting under his authority, as the proceeds of the sale of said bonds.

H. For further answer to each of the counts of the said complaint this defendant separately says that continuously since, to-wit: the 24th day of August, 1900, the defendant Cochran has been, and is now, the treasurer of the plaintiff, and by the laws of the State of Alabama has been continuously since, to-
103 wit: the 24th day of August, 1900, and is now the sole custodian of the money belonging to the plaintiff, and has had during the period aforesaid, and has now, the right to hold and keep the money of the plaintiff until such time as the same is or shall be legally demanded of him as said treasurer, or until the termination of his term of office as such treasurer, which he alleges will not occur until the .... day of November, 1904. And this defendant avers that there never

has been any demand made upon the said Cochran or his surety in the manner provided by law for the payment of any part of the money sued for in this suit. And this defendant avers that the plaintiff has no legal right to any part of the money sued for, and no right to have a judgment against said Cochran or his surety therefor. Wherefore this defendant says the plaintiff cannot recover.

EDGAR H. GANS,
THOS. A. WHELAN,
THOS. H. WATTS,
ALEX. TROY,
Attys. for Fidelity & Deposit Co. of Md.

Filed Feby. 3, 1904.

J. W. DIMMICK, Clerk.

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PLAINTIFF'S DEMURRERS TO PLEAS OF DEFENDANT JNO. J. COCHRAN.

In the Circuit Court of the United States for the Middle District of Alabama.

County of Montgomery, Plaintiff,
vs.
John J. Cochran and the Fidelity & Deposit Company of Maryland, Defendants.

The plaintiff in the above entitled cause demurs to the pleas of the defendant, John J. Cochran, filed on the 3rd day of February, 1904, as hereinafter set forth (plaintiff's motion to strike said pleas having been overruled by the Court).

To plea designated B plaintiff demurs and for grounds of demurrer assigns the following:

1. Said plea presents an issue of law and not an issue of fact.

2. Said plea does not deny or confess and avoid the allegations of the complaint showing that the defendant Cochran was the county treasurer of the plaintiff, that the defendant Fidelity & Deposit Company of Maryland was the surety on his official bond, and that said defendant Cochran as such treasurer received the money arising from the sale of certain bonds issued by the plaintiff county and converted the same to his own use or to the use of another whereby the same was lost to plaintiff in the sum of $111,109.58 as alleged in the complaint.

3. Said plea does not deny or confess and avoid the allegations of the complaint showing liability on the part of the defendants for the proceeds of the sale of the road and bridge bonds amounting to $111,109.58.

4. Said plea does not deny or confess and avoid the allegations of the complaint showing that the defendant Cochran, as county treasurer of the plaintiff, received a check for the price of said bonds and deposited said check to his credit in the bank of Josiah Morris & Company, whereby said sum was lost to plaintiff.

105 5. Said plea does not deny or confess and avoid the allegations of the complaint showing that the defendant, Cochran, as county treasurer of the plaintiff, by and through his deputy, Kohn, executed to the board of revenue of the plaintiff county said treasurer's receipt for the purchase price of said road and bridge bonds, thereby causing said bonds to be delivered to the purchaser, and thereby causing loss to the plaintiff in said sum of $111,109.58.

To plea designated C, plaintiff demurs, and for grounds of demurrer thereto assigns the following:

1. Said plea shows that the defendant is bound by the acts of said deputy, Kohn, as alleged therein.

2. Said plea shows that said Kohn was the duly authorized deputy of said treasurer, Cochran, and that said Kohn, as such deputy, received said sum of $111,109.58 in such manner as to render the defendant liable therefor in this action.

3. Said plea shows that said Kohn was the duly authorized deputy of said treasurer, Cochran, and that said treasurer, through his said deputy, collected said sum of $111,109.58 and made a general deposit thereof to his credit as such treasurer in said bank.

4. Said plea shows that the defendant, Cochran, as the treasurer of the plaintiff, received said sum of $111,109.58 and that he did not safely keep said money, but made a general deposit thereof to his credit as such treasurer in said bank.

5. The alleged insolvency of the bank in which the check was deposited to the credit of the defendant, Cochran, as treasurer of the plaintiff, can furnish no defense to this action.

6. Said plea does not deny or confess and avoid the allegations of the complaint showing that the defendant, Cochran, as county treasurer of the plaintiff, by and through his deputy, Kohn, executed to the board of revenue of the plaintiff county said treasurer's receipt for the purchase price of said road and bridge bonds, thereby causing said bonds to be delivered to the purchaser, and thereby causing loss to the plaintiff in said sum of $111,109.58.

106 To plea designated D, plaintiff demurs, and for grounds of demurrer thereto assigns each of the grounds of demurrer hereinabove assigned to plea C.

To plea designated E, plaintiff demurs, and for grounds of demurrer assigns each of the grounds of demurrer hereinabove assigned to plea C.

To plea designated F, plaintiff demurs, and for grounds of demurrer assigns each of the grounds of demurrer hereinabove assigned to plea C.

To plea designated G, plaintiff demurs, and for grounds of demurrer assigns each of the grounds hereinabove assigned to plea C.

To plea designated H, plaintiff demurs, and for grounds of demurrer assigns each of the grounds of demurrer hereinabove assigned to plea C, and the following additional grounds:

7. It does not appear from said plea H that the defendant, Cochran, as such treasurer, has safely kept the money of the plaintiff sued for in this action.

8. Said plea does not deny the conversion by said Cochran of the money of the plaintiff, as alleged in the complaint.

Said plea does not deny the allegations of the complaint showing that the defendant, Cochran, as treasurer of the plaintiff, has breached his official bond as alleged in the complaint.

8. The fact that the defendant, Cochran, remains in office as such treasurer can furnish no defense in bar or abatement of this action.

JNO. G. FINLEY,
J. F. STALLINGS,
WM. L. MARTIN,
Attorneys for Plaintiff.

Filed in office, Feb'y. 3, 1904.

J. W. DIMMICK,
Clerk.

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107 PLAINTIFF'S DEMURRERS TO PLEAS OF DEFENDANT FIDELITY & DEPOSIT COMPANY OF MD.

In the Circuit Court of the United States for the Middle District of Alabama.

County of Montgomery, Plaintiff,
vs.
John J. Cochran and the Fidelity & Deposit Company of Maryland, Defendants.

The plaintiff in the above entitled cause demurs to the pleas of the defendant Fidelity & Deposit Company of Maryland

filed on the 3rd day of February, 1904, as hereinafter set forth (plaintiff's motion to strike said pleas having been overruled by the Court).

To plea designated B plaintiff demurs and for grounds of demurrer assigns the following:

1. Said plea presents an issue of law and not an issue of fact.

2. Said plea does not deny or confess and avoid the allegations of the complaint showing that the defendant Cochran was the county treasurer of the plaintiff, that the defendant Fidelity & Deposit Company of Maryland was the surety on his official bond, and that said defendant Cochran as such treasurer received the money arising from the sale of certain bonds issued by the plaintiff county and converted the same to his own use or to the use of another whereby the same was lost to plaintiff in the sum of $111,109.58 as alleged in the complaint.

3. Said plea does not deny or confess and avoid the allegations of the complaint showing liability on the part of the defendants for the proceeds of the sale of the road and bridge bonds amounting to $111,109.58.

4. Said plea does not deny or confess and avoid the allegations of the complaint showing that the defendant Cochran, as county treasurer of the plaintiff, received a check for the price of said bonds and deposited said check to his credit in the bank of Josiah Morris & Company, whereby said sum was lost to plaintiff.

108 5. Said plea does not deny or confess and avoid the allegations of the complaint showing that the defendant, Cochran, as county treasurer of the plaintiff, by and through his deputy, Kohn, executed to the board of revenue of the plaintiff county said treasurer's receipt for the purchase price of said road and bridge bonds, thereby causing said bonds to be delivered to the purchaser, and thereby causing loss to the plaintiff in said sum of $111,109.58.

To plea designated C, plaintiff demurs, and for grounds of demurrer thereto assigns the following:

1. Said plea shows that the defendant is bound by the acts of said deputy, Kohn, as alleged therein.

2. Said plea shows that said Kohn was the duly authorzied deputy of said treasurer, Cochran, and that said Kohn, as such deputy, received said sum of $111,109.58 in such manner as to render the defendant liable therefor in this action.

3. Said plea shows that said Kohn was the duly authorized

deputy of said treasurer, Cochran, and that said treasurer, through his said deputy, collected said sum of $111,109.58 and made a general deposit thereof to his credit as such treasurer in said bank.

4. Said plea shows that the defendant, Cochran, as the treasurer of the plaintiff, received said sum of $111,109.58 and that he did not safely keep said money, but made a general deposit thereof to his credit as such treasurer in said bank.

5. The alleged insolvency of the bank in which the check was deposited to the credit of the defendant, Cochran, as treasurer of the plaintiff, can furnish no defense to this action.

6. Said plea does not deny or confess and avoid the allegations of the complaint showing that the defendant, Cochran, as county treasurer of the plaintiff, by and through his deputy, Kohn, executed to the board of revenue of the plaintiff county said treasurer's receipt for the purchase price of said road and bridge bonds, thereby causing said bonds to be delivered to the purchaser, and thereby causing loss to the plaintiff in said sum of $111,109.58.

109 To plea designated D, plaintiff demurs, and for grounds of demurrer thereto assigns each of the grounds of demurrer hereinabove assigned to plea C.

To plea designated E, plaintiff demurs, and for grounds of demurrer assigns each of the grounds of demurrer hereinabove assigned to plea C.

To plea designated F, plaintiff demurs, and for grounds of demurrer assigns each of the grounds of demurrer hereinabove assigned to plea C.

To plea designated G, plaintiff demurs, and for grounds of demurrer assigns each of the grounds hereinabove assigned to plea C.

To plea designated H, plaintiff demurs, and for grounds of demurrer assigns each of the grounds hereinabove assigned to assigned to plea C, and the following additional grounds:

7. It does not appear from said plea H that the defendant, Cochran, as such treasurer, has safely kept the money of the plaintiff sued for in this action.

8. Said plea does not deny the conversion by said Cochran of the money of the plaintiff, as alleged in the complaint.

Said plea does not deny the allegations of the complaint show-

ing that the defendant, Cochran, as treasurer of the plaintiff, has breached his official bond as alleged in the complaint.

8. The fact that the defendant, Cochran, remains in office as such treasurer can furnish no defense in bar or abatement of this action.

JNO. G. FINLEY,
J. F. STALLINGS,
WM. L. MARTIN,
Attorneys for Plaintiff.

Filed in office, Feb'y. 3, 1904.

J. W. DIMMICK,
Clerk.

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110 JUDGMENT ENTRY.

In the Circuit Court of the United States for the Middle District of Alabama.

County of Montgomery
vs. No. 808.
John J. Cochran and Fideltiy & Deposit Company of Maryland.

Wednesday, February 3, 1904.

Came the parties by their attorneys in obedience to the mandate of the Circuit Court of Appeals for the Fifth Circuit, and it is ordered by the Court that a new trial be and is hereby granted in this cause.

The defendants severally moved the Court in writing to grant a repleader in this cause. Upon consideration it is ordered that the said motion be and the same is hereby overruled.

The defendants severally moved the court to permit them to refile the demurrer filed by them, respectively, to the complaint and the various counts thereof at the last trial of this cause, and upon consideration it is ordered that said motion be and the same is hereby overruled. The defendants severally moved the Court in writing for permission to refile the pleas two to six, inclusive, filed on the last trial of this cause, and upon consideration, it is ordered that said motion be and the same is hereby overruled.

Thereupon the defendants severally filed to the several counts of the complaint new demurrers, and upon consideration, it is ordered that the said demurrers be and the same are hereby severally overruled. And thereupon the defendants, by leave of

the Court, severally filed their pleas, numbered A to H, inclusive, and thereupon the plaintiff demurred to each of said pleas except plea A, so filed by the defendants, respectively, and upon consideration it is considered that said demurrers interposed by the plaintiff to each of said pleas B to H, inclusive, as filed by each defendant, be and the same are hereby severally sustained.

And thereupon issue was joined on plea number one, being the general issue, filed by each defendant. And there-
111 upon came a jury of good and lawful men, composed of A. P. Wilson and eleven others, who, being elected, empanelled and sworn to try the issue joined and a true verdict to render according to the evidence, upon their respective oaths, do say: We, the jury, find the issues in favor of the plaintiff, and if, in the opinion of the Court, the plaintiff is entitled to interest on the amount of money converted from the time of the conversion, viz: January 3, 1901, we assess the damages of the plaintiff at one hundred and one thousand and seventeen dollars and ninety cents; but if, in the opinion of the Court, the plaintiff is entitled to interest on the amount of money converted from the time of the bringing of this suit and not from the time of the conversion, we assess the damages of the plaintiff at ninety-two thousand dollars and forty-three cents; but if, in the opinion of the Court, the plaintiff is entitled to no interest on the amount of money converted, we assess the damages of the plaintiff at seventy-eight thousand, four hundred and forty-four dollars and two cents.

Upon the rendition of said verdict each of the defendants reparately moved the Court not to enter judgment against said defendants for a sum exceeding seventy-eight thousand, four hundred and forty-four dollars and two cents, and upon consideration it is ordered, that the said motion be and the same is hereby overruled. Thereupon, each of the defendants separately moved the Court not to render judgment against said defendant for a sum exceeding ninety-two thousand dollars and forty-three cents, and upon consideration, it is ordered that the said motion be and the same is hereby overruled. Each of the defendants separately objected to the rendition of judgment against said defendant for a sum exceeding seventy-eight thousand, four hundred and forty-four dollars and two cents, and upon consideration, it is ordered that the said objection be and the same is hereby overruled. Thereupon, each of the defendants separately objected to the rendition of a judgment against said defendant for a sum exceeding ninety-two thousand dollars and forty-three cents, and upon consideration, it is ordered that the said objection be and the same is hereby overruled.

Thereupon, the plaintiff moved the Court in writing
112 to render judgment upon said verdict in its favor for the sum of one hundred and one thousand and seventeen dollars and ninety cents, and upon consideration, it is ordered that the said motion of the plaintiff be and the same is hereby granted.

It is therefore considered by the Court, that the plaintiff have and recover of the defendants the sum of one hundred and one thousand and seventeen dollars and ninety cents, together with the costs in this behalf expended, for which let execution issue.

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113 BILL OF EXCEPTIONS.

In the Circuit Court of the United States for the Middle District of Alabama.

County of Montgomery
vs.
John J. Cochran and Fidelity & Deposit Company of Maryland.

Bill of Exceptions.

Be it remembered, That at a regular term of the Circuit Court of the United States for the Middle District of Alabama, and commencing on the first day of February, 1904, and ending on the 3d day of February, 1904, the following proceedings were had in the cause in said court pending of County of Montgomery versus John J. Cochran and Fidelity & Deposit Company of Maryland, which cause was then and there tried.

The Court, in obedience to the mandate of the United States Circuit Court of Appeals for the Fifth Circuit, set aside the former judgment and ordered a new trial in the said cause, which new trial was had at the date aforesaid.

Each of the defendants separately moved the Court, in writing, "to grant a repleader in this cause," which motion the Court overruled and each defendant, then and there in open court, and before the jury retired, excepted to said action of the Court.

Each of the defendants separately moved the Court in writing "for leave to file the demurrer to the complaint in this cause, which was filed at the last trial." This motion the Court overruled, and each of the defendants, separately, in open court and before the jury retired, excepted to said action of the Court.

Each of the defendants separately moved the Court in writing

"for leave to refile in this case each of the pleas from 2 to 6, inclusive, which were filed in this case at the last trial." The Court overruled the said motion and each of the defendants, separately, in open court and before the jury retired, excepted to said action of the Court.

114 The defendants separately filed a new demurrer to the complaint and to the several counts thereof, which demurrer was overruled, and each of the defendants then, separately, filed their additional pleas, numbered from B to H, inclusive, to which a demurrer was sustained, thus leaving as the only plea upon which the case was tried, that of the general issue, which denied each and every allegation of each and every count of the complaint.

The plaintiff introduced in evidence a bond, executed by the defendants, in words and figures as follows, viz.:

"The State of Alabama,
Montgomery County.

"Know all men by these Presents, That we, John J. Cochran, of the State and county aforesaid, and the Fidelity & Deposit Company of Maryland, a corporation of Maryland, as surety, are held and firmly bound unto the County of Montgomery in the sum of one hundred and twenty thousand dollars ($120,000.00), for the payment of which, well and truly to be made and done, we bind ourselves, our heirs, executors, administrators and assigns, firmly by these presents.

Sealed with our seals and dated this 17th day of August, A. D. 1900.

The condition of the above obligation is such, that whereas, the above bound, John J. Cochran was, on the 6th day of August, 1900, elected treasurer of Montgomery County, in and for said county. Now, if the said John J. Cochran shall faithfully discharge the duties of such office during the time he continues therein, or discharges any of the duties thereof, then the above obligation to be void; otherwise to remain in full force and effect.

JOHN J. COCHRAN, [L. S.]
FIDELITY & DEPOSIT COMPANY
OF MARYLAND. [L. S.]
By R. F. MANLEY, Attorney in Fact.

Approved and ordered of record, this the 24th day of August, A. D .1900.
(U. S. R. Stamp, 1.64). J. B. GASTON,
Judge of Probate Court, Montgomery County.

The plaintiff then introduced in evidence the act of the Legislature of Alabama, approved December 13th, 1900, which is in words and figures as follows, viz.:

"To authorize the board of revenue of Montgomery
115 County to issue bonds of said county for an amount not to exceed one hundred thousand dollars, for the purpose of building and improving the public roads of the county upon a permanent and well considered system, and for erecting bridges in said county.

Section 1. Be it enacted by the General Assembly of Alabama, that the board of revenue of the County of Montgomery be and are hereby authorized to issue bonds of said County of Montgomery to an amount not exceeding one hundred thousand dollars, or so much thereof as said board of revenue may deem necessary for the purposes hereinafter named in the sum of one thousand dollars each, and shall be numbered from "A" 1 to 100, consecutively, and payable at such place or places as said board of revenue may designate, at such time or times not exceeding forty years from the date thereof, as may be designated by the said board of revenue. Said bonds to bear interest at the rate of not exceeding five per centum per annum, and said bonds shall be exempted from county and municipal taxation. Provided, that after twenty years from the date of the issue of said bonds, the said board of revenue may pay off and redeem annually twenty thousand dollars of said bonds, beginning at number one and running consecutively until all of said bonds have been paid off and discharged.

Section 2. Be it further enacted, That the bonds authorized to be issued under the provisions of this act shall be signed by the clerk of said board of revenue of said county and countersigned by the president of said board of revenue, and the seal of the board of revenue shall be affixed thereto; and the fac simile signature of the clerk of said board to the coupons of said bonds shall be equivalent to a manual signature thereof, and the clerk of said board must keep a correct record and account of all the bonds issued and disposed of under this act.

Section 3. Be it further enacted, That the said board of revenue of said County of Montgomery are hereby authorized to do any and all things necessary to carry out the provisions hereby granted, either through themselves or by agent or agents, duly appointed by them for that purpose, at any term of said board of revenue, whether at a regular or special term thereof, and no technicality, informality, irregularity, neglect or omission in the proceedings or records of said board of revenue shall

in any wise vitiate or annul said bonds or coupons, which shall have all the protection of commercial paper.

116 Sec. 4. Be it further enacted, That the board of revenue of said county are hereby authorized to negotiate and sell such bonds as are issued by them by virtue of this act, but said bonds shall not be sold for less than par (100 cents on the dollar), and the proceeds of said bonds shall be paid over to and kept by the treasurer of said county and applied to pay for the building and improving the public roads of the county upon a permanent and well considered system, and for erecting bridges in said county; such use, payment and application of said proceeds to be under the direction and by authority of said board of revenue of said county of Montgomery, and the said county treasurer to be responsible for the safe keeping of all the proceeds accruing from the sale of said bonds, which may come into his hands in his official capacity, the same as for other county funds or moneys in his hands as such treasurer; and there shall be no commission paid said county treasurer for disbursing the funds accruing from the sale of the bonds named in this act.

Sec. 5. Be it enacted. That it shall be unlawful for said board of revenue or any member thereof or any of the officers of the said County of Montgomery to apply the proceeds of the sale of any of the bonds issued by authority of this act to any other purpose than that hereinbefore specified.

Sec. 6. Be it further enacted, That the coupons attached to said bonds herein authorized to be issued shall, as they respectively mature and become payable, be receivable for county taxes and county dues in said County of Montgomery.

Approved December 13, 1900."

It was here agreed that at the time of the failure of Josiah Morris & Company, there was standing to the credit of Cochran as County Treasurer, on the books of said banking house as general deposit sums amounting to $147,554.80; that said amount included the road and bridge fund, amounting at the date of said failure to the sum of $104,592.42. That on the general fund, the sum of $5,370.29 was paid by Cochran July 2d, 1901, and the further sum of $5,370.29 was paid by Cochran on June 14, 1902., and, on August 12th, 1902, the Fidelity & Deposit Company of Maryland paid on the general fund $36,-869.92, which was a judgment for $32,221.80 and $4,648.12 interest, leaving nothing unpaid on the general fund. That on July 2, 1901, Cochran paid $13,074.05 on the road and bridge fund, and on June 14, 1902, Cochran paid $13,074.05 on the road and bridge fund, and no other payments have been made,

and the controversy on this trial relates only to the
117 balance of said road and bridge fund.

The plaintiff introduced said John J. Cochran as witness, who testified substantially as follows, viz.:

"I was elected treasurer of Montgomery county in August, 1900, executed the bond introduced in evidence August 17th, 1900, and went into office September 1st, 1900, and have continuously since been such treasurer, my term not having expired. I collected from the former treasurer over thirty thousand dollars by certified check and turned it over to the bank. I performed no other duties of the office, collected no other money and had nothing to do with the management of the office. Mr. Kohn performed all the duties under the following power of attorney executed by me and delivered to him, viz.:

State of Alabama, Montgomery County.

I, John J. Cochran of said County, hereby constitute and appoint John P. Kohn, of Montgomery, Alabama, my true and lawful attorney, to receive and receipt for in my name all moneys coming into my possession as treasurer of the said County of Montgomery, Alabama, and in my name, as treasurer, to pay out all moneys required by law to be paid out by me, upon checks signed by the clerk of the board of revenue of said Montgomery county and further to make reports, keep all books required by law to be made or kept by me as such County Treasurer, and to do and perform all acts and things I might lawfully do in my own name, as such County Treasurer, and I do hereby ratify and confirm all the acts and things that may be done by the said John P. Kohn, acting as my agent under the authority of this power, as if the same were done in person by myself.

In witness whereof, I hereunto set my hand and affix my seal, this September 1st, A. D. 1900.

JOHN. J. COCHRAN,
As Treasurer of Montgomery County, Alabama.

Witness:
E. P. MORRISSETTE,
BIBB GRAVES.

I live twenty-four miles from town. Know nothing of the sale of the bonds except what I saw in the papers. My only place of business as treasurer was the banking house of Josiah Morris & Co. I had no personal knowledge of the amount which had been paid out of the proceeds of the bonds before

the failure of Josiah Morris & Co.; I heard it was
118 about seven thousand dollars. The way I came to begin depositing the money of the county with Josiah Morris & Co., was that Mr. Billing of that firm agreed to attend to the duties of the office for me, and I was to deposit the money of the County with his bank. The Fidelity & Deposit Company asked me when they made the bond, where I would deposit the money I received as treasurer, I told the company that I would deposit it with Josiah Morris & Co.

On cross-examination said witness testified:

I had no agreement with the Fidelity & Deposit Co., as to the appointment of Kohn as my deputy, and said company did not know he was to be or was my deputy. I had no knowledge of the transaction in relation to the sale of the bonds. I was at home, I don't know whether I came to Montgomery between the bond sale and the failure, but came the night the bank failed. I had nothing to do with receiving a check from Josiah Morris & Co., in payment for the road bonds, never saw the check before the failure and had nothing to do with it. I was never informed before the failure of Josiah Morris & Co., that those bonds had been bought with a check from Josiah Morris & Co., and never knew that I had been credited with that check until after the bank failed. The bank of Josiah Morris & Co., failed January 25th, 1901, and I knew nothing of the transaction in reference to the sale and deposit of the money with Josiah Morris & Co. of the bonds, until after the failure of Josiah Morris & Co. The whole matter was conducted by Kohn, including the drawing out of said road and bridge fund. John P Kohn, the cashier of Josiah Morris & Co., is the same man I appointed deputy, and who had the transaction in reference to the road and bridge bonds.

Re-Direct Examination.

It was understood between Mr. Billing and me that I would appoint Kohn as my deputy and that Josiah Morris & Co., should have the money of the county on deposit. I never looked over the treasurer's books at all. I asked Kohn to take charge of them and to make all reports required.

The plaintiff then introduced JOHN P. KOHN, who testified in substance as follows:

I was deputy treasurer under Cochran acting under the pow-

er of attorney in evidence. On January 8th, 1901, I made an entry on the treasurer's books of $111,109.58, received as proceeds of $100,000 bonds. I was appointed deputy treas-
119 urer about September 1st, 1900, and attended to the business of county treasurer from that time until Josiah Morris & Co., failed. Josiah Morris & Co., bought the $100,000 of bonds for $111,109.58. I signed the check to pay for the bonds in the name of Josiah Morris & Co, by direction of Billing, for that amount as follows:

"Montgomery, Alabama, January 8, 1901.

Josiah Morris & Co: Pay to the order of John J. Cochran, county treasurer one hundred and eleven thousand, one hundred and nine and 58-100 dollars.

(Signed) JOSIAH MORRIS & COMPANY,
By KOHN.

I handed the check to Allen, clerk of the board of revenue. He looked at it, handled it in an indifferent way and said: "Well I don't need this, it belongs to you, you take it. Just bring me a receipt," or words to that effect. I went back to the bank of Josiah Morris & Co., got a blank form of receipt out of the county treasurer's book and filled out the following receipt:

The State of Alabama, Montgomery County.

No. 507. Office of County Treasurer.

Received from the board of revenue of county, one hundred and eleven thousand, one hundred and nine, 58-100 dollars proceeds sale $100,000.00 bonds.

$111,109.59.

(Signed) JOHN J. COCHRAN,
County Treasurer.
By JOHN P. KOHN, his Atty.

Duplicate.

I carried the receipt and handed it to Allen. Allen delivered the $100,000.00 bonds to me when I delivered the receipt. I took the bonds to the bank of Josiah Morris & Co., and delivered them to some one at the bank. I took the check to said bank, made out a deposit slip for the credit of John J. Cochran, County Treasurer, Road and Bridge Fund, and turned it over to the receiving teller. I could not swear that any one gave credit for it on the books of the bank. I did not. I made the entry for it on the books of the county treasurer. I endorsed the check "John J. Cochran, County Treasurer, by John P. Kohn, his Attorney." The bonds after being delivered at the bank, were put up in an express bundle and shipped by

express to the Western National Bank, New York City. They were negotiable coupon bonds. J. R. Sayre was the receiving teller at Josiah Morris & Co.'s at that time. The deposit of the check was made on the evening of the 8th of January, 1901. The entry on the treasurer's books is dated January 8th, 1901.

Cross-Examination.

I took the check to Allen about four o'clock in the afternoon of the 8th of January, I suppose I said something about coming after the bonds. I don't remember what I said. Allen took the check, looked at it, made some remarks about it that I don't recollect exactly, and said: "Well, you take it, I don't need it in my business, bring me a receipt." Allen knew I was a clerk of Josiah Morris & Co., when I handed him the check and asked for the bonds Allen said, "You are the county treasurer, I don't need it in my business, bring me a receipt." I went back about one-quarter of a mile, to the bank of Josiah Morris & Co., and made out the receipt. Although the receipt reads: "Received of the board of revenue of ————County," so many dollars, I received nothing except the check. I took the check back to the bank, endorsed it and handed it to the receiving teller of the bank. I am not certain whether I endorsed the check before or after I got the bonds. I think I deposited the check after I got the bonds. I testified on the former trial: "I then carried the bonds to the banking house of Josiah Morris & Co., and turned them over to Mr. Billing and I endorsed the check "John J. Cochran, County Treasurer, by John P. Kohn, his attorney in fact," and made out deposit slip for the amount to the credit of John J. Cochran. My recollection at the last trial was better than now.

I handed Allen the receipt and he handed me the bonds, I stated nothing to Allen at the time. I did not tell Allen I had collected the money for the bonds, I made no remark to Allen from which he could infer any such thing. The banking hours of Josiah Morris & Co., at that time were from nine A. M. to two P. M., this bond transaction occurred after banking hours. I received no gold, silver or bank notes for the bonds. I received only that check; the entry I made on the treasurer's books of the receipt of $111,109.58, was for the said check, as follows: "1901. Jany. 8—To cash received from Board of Revenue on account of sale of $100,000 bonds road and bridge fund, $111,109.58."

The defendants asked the said witness Kohn the following

question, viz.: "What amount of cash was there in the bank of Josiah Morris & Co., on the 8th and 9th of January, 1901?" The plaintiff objected to said question as calling for illegal and irrevelent testimony. The court said he would hear the answer of the witness before ruling. The witness answered
121 $35,000.00." The plaintiff moved to exculde the said answer as evidence, upon the ground that it was illegal and irrevelent testimony. The defendant stated that the object of offering the testimony was to show the condition of the bank on the day the check was given and upon the day afterwards. The court sustained the said motion to exclude said testimony, and each defendant, separately, in the presence of the jury and before the jury retired, excepted to said ruling of the court.

The witness Kohn further testified that prior to time of bond sale, warrants amounting to $748.16 drawn by the clerk of the Board of Revenue on the road and bridge fund were paid by the bank for the treasurer, and the amount credited to the treasurer on the books, although the fund had not then actually accrued; that between the 8th and 25th of January, 1901, warrants drawn by the clerk of the Board of Revenue on said road and bridge fund, were paid by the bank for the treasurer, amounting to $5,769.00, and credited to the treasurer on his books, and that the amount of said road and bridge fund on January 25, 1901, after deducting said payments, was, $104,592.42.

Re-Direct Examination.

I went through the usual form in making the deposit slip. I don't know as to any entry made on the books of the bank in this matter. The $100,000.00 of bonds were shipped away from Montgomery by Josiah Morris & Co., on the evening of January the 8th, 1901, to the Western National Bank of New York. After the shipment of the bonds, Josiah Morris & Co., received notice from the Western National Bank of a credit for $95,000.00 advanced on the note of Josiah Morris & Co., secured by the bonds as collateral. My best recollection is that this credit was dated about three days after the shipment of the bonds. This was a cash credit subject to check. Josiah Morris & Co., had other correspondent banks, but I don't know as to the state of accounts between them. Two other members of the Board of Revenue besides Allen were present when the bonds were delivered.

The defendants asked the said Kohn the following question:

"How long did the $95,000, which Josiah Morris & Co. borrowed on the pledge of the bonds, remain in the Western National Bank?" The plaintiff objected to said question, as calling for irrevelent and illegal testimony. The court said he would hear the answer before ruling, and the witness answered: "I could not tell how long the credit remained with the Western National Bank, checks for several days were drawn against this credit. There were checks to Hubbard, cashier of Capital City Bank, for $7,500, on the 10th of January, 1901, to Louis B. Farley for $10,000, the same day; on the 11th of January, $11,000.00 to Union Bank of Nashville; on January 12th, National Park Bank $18,000.00; on January 13th, First National Bank, Birmingham, $10,000.00; on January 14, to same bank $10,000.00. On the 8th and 9th of January, 1901, the credit given by the Western National Bank was not available." The plaintiff moved to exclude this answer, upon the ground that it was irrevelent and illegal. The defendants stated that the evidence was offered to show the condition of the bank and its insolvency. The court sustained said motion to exclude said testimony and the defendants, separately, in open court and before the jury retired, excepted to said ruling of the court.

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The defendants asked the witness Kohn to what extent Josiah Morris & Co., was overdrawn in the Hanover National Bank on the 8th and 9th of January, 1901? The plaintiff objected to said question, the court stated he would hear the testimony before ruling. The witness testified that Josiah Morris & Co., on the dates asked about, were overdrawn in the Hanover National Bank in the sum of $85,000.00 to $95,000.00, and perhaps to the extent of $120,000.00. The plaintiff moved to exclude said answer, the court granted the said motion, and the defendants, separately, in open court and before the jury had retired, excepted to said action of the court.

The witness Kohn further testified:

Cochran came to the bank between the bond transaction and the failure of the bank, but I did not show or explain to him what had been done.

Q. What conversation took place, Mr. Kohn, touching this bond issue and this deposit in bank, and the credit on the treasurer's books given therefor, what took place along that line?

A. I don't remember the exact nature of the conversation, nor the words of the conversation.

Q. Tell us as near as you can recall.

A. Simply to the effect that the bond sale had been made and supposed the money was there, or may have asked if he had

the money or was it all right, or something like that. Mr. Cochran dropped in for a moment or two, passed me and made some remarks about the matter. I don't remember the exact words he used. That is all that took place. I may have told him who bought the bonds. I don't remember. I did not show him the treasurer's books. I did not tell him what disposition I had made of the money nor where I had deposited it.

123 Josiah Morris & Co. failed to open its doors January 25th, 1901. It was a voluntary suspension.

It was here admitted, subject to the objection hereinbelow made to its relevancy and legality, that after the failure of Josiah Morris & Co. all creditors of Josiah Morris & Co. made with Josiah Morris & Co. an agreement in writing by which the time of payment by Josiah Morris & Co. of the amounts due to said creditors, was extended, so that Josiah Morris & Co. would pay to each of said creditors the following percentages on their respective debts at the times mentioned, viz.: 12 1-2 per cent July 1st, 1901; 12 1-2 per cent Dec. 1st, 1901; 25 per cent July 1st, 1902; 25 per cent Jany. 1st, 1903, and 25 per cent July 1st, 1903. That this agreement was made with Josiah Morris & Co. by Cochran, treasurer, by and with the consent of the board of revenue of Montgomery county, and by and with the consent of the Fidelity & Deposit Company of Maryland, but with the distinct understanding that said agreement, so made between Cochran and Josiah Morris & Co. should not in any manner affect or waive any right which either party had, at the time of making the said agreement, as to the prosecution or defense of any suit which might arise on this matter against the treasurer of the county or his surety; it is further agreed that the dividend agreed to be paid July 1st, 1901, was paid July 2d, 1901, to all the creditors of Josiah Morris & Co., and that on account of the road and bridge fund involved in this case amounting to $104,592.42, there was paid to Cochran 12 1-2 per cent amounting to $13,074.05, and that dividend payable December 1st, 1901, was paid June 14th, 1902, to all creditors of Josiah Morris & Co., and that on account of the road and bridge fund involved in this case, amounting to $104,592.42, there was paid to Cochran 12 1-2 per cent June 14th, 1902, amounting to $13,074.05 and that nothing has been paid since to Cochran or to any other person creditor of Josiah Morris & Co.

This agreement was entered into for the purpose of saving time in the production of formal proof, but the facts therein stated, except as to the two payments of $13,074.05 on the dates set out, were duly objected to by plaintiff, and plaintiff moved

to exclude the same on the ground that the said facts so set out are illegal and irrelevant as evidence.

The Court sustained the said motion of the plaintiff, and excluded from the jury the facts admitted to be true in the said agreement, except the facts not objected to. To this ruling of the Court each defendant then and there separately, in the presence of the jury, excepted.

CHAS. A. ALLEN was introduced as witness by
124 the plaintiff, and testified as follows:

I was, on the 8th day of January, 1901, and had been for some time, clerk of the board of revenue of Montgomery county. The board of revenue sold Josiah Morris & Co. $100,000.00 of bonds for $111,109.58, on the 7th of January, 1901. When Kohn came for the bonds he offered me a check payable to John J. Cochran, treasurer, drawn by Kohn in the name of Josiah Morris & Co., on Josiah Morris & Co., for $111,109.58. I told Kohn I did not need the check in my business, that it was for the county treasurer, to take it back and bring me a receipt for the money and I would give him the bonds. He went off and brought back the receipt, was gone about half an hour. This was about three o'clock in the afternoon. He handed me the receipt and I gave him the bonds. I gave him the bonds on the faith of the receipt. The bonds were never returned to the county. They were 5 per cent negotiable coupon bonds. The payments out of the road and bridge fund, between the sale of the bonds and the failure of the bank, were paid out on my checks drawn on Cochran as treasurer.

Cross-Examination.

The transaction between me and Kohn may have been as late as four o'clock in the afternoon, after banking hours. I knew the treasurer was depositing the county's money with Josiah Morris & Co. The receipt was drawn after the check was presented to me.

The defendants asked said Allen the following question: "Did you think at the time Kohn brought the receipt and got the bonds that he had deposited the check in the bank to the credit of Cochran, county treasurer?" The plaintiff objected to the question on the ground that it called for irrelevant and illegal testimony, and that plaintiff could not be bound by what Allen thought. The Court said he would hear the answer before ruling, and the witness answered: "I can't say as to that;

I, of course, thought the county treasurer was all right, or would not have given the bonds."

Q. What? A. If I had thought that the money was not in the county treasury all right, I would not have given up the bonds. The only way I thought Kohn had gotten the money was by depositing the check in the bank. The only way I knew he had the money was by his receipt. I thought Josiah Morris & Co. were solvent at the time of the delivery of the bonds. I thought the check was good. I did not take the check, it was not payable to me but to John J. Cochran, treasurer; I had no right to it at all. I was bound to have a voucher in my office.

The plaintiff then moved to exclude that part of the answer of the witness in which he said "I thought Josiah Morris & Co. were solvent at the time of the delivery of the bonds. I thought the check was good," upon the same grounds of objection to the question. The Court granted the said motion, and excluded said answer as evidence, and each of the defendants then and there separately, in open court and before the jury retired, excepted to said action of the court.

The witness Allen was asked the following question: "Didn't you treat the check as money?" The witness answered: "I did not take the check. It was not payable to me at all. It was payable to John J. Cochran as county treasurer, and I had no right to take it."

The said Allen further testified:

Q. You parted with the bonds, you wanted a voucher in your office. At the time he brought the check, you thinking the check given by a solvent bank, and being payable to Cochran as county treasurer, if he had brought the receipt at that time and handed you the check and the receipt, you would have given him the bonds? The plaintiff objected to so much of said question, commencing with "at the time he brought the check, you, thinking the check given by a solvent bank, and being payable to Cochran as county treasurer, if he had brought the receipt at that time and handed you the check and the receipt, you would have given him the bonds," for the reason that the question called for illegal and irrelevant testimony. The Court said before ruling he would hear the answer of the witness. The witness then answered: "Certainly I would on his receipt." The plaintiff moved to exclude said answer, the Court sustained said motion, and each of the defendants then and there, in open court and before the jury retired excepted to said action of the Court.

Q. If instead of going back because he did not bring the receipt first, if at that time he brought the check and tendered it to you, and you said you did not need that, you did not need that in your business, that Cochran was county treasurer, if at that time he brought the receipt and handed you the
126 receipt, then you would have given him the bonds at that time, would you not? A. Yes, I would. There was no conversation that I know of between me and Kohn at the time he gave me the receipt that I know of; only gave him the bonds, that is all that I recollect.

Q. It was after banking hours, did you think he had deposited the check after banking hours that day? A. I did not have any right to think about it. I was only recognizing the county treasurer. I thought that was all I had to do with it. I would have taken the receipt at the time the check was offered, all I wanted was a voucher according to he ordinary course of business.

Re-Direct Examination.

Q. On the faith of what did you deliver those bonds? A. On this receipt.

Q. Did you know at the time you accepted that receipt that the cash money had not been paid? A. No, sir; I did not.

Q. Did you understand what was meant by cash money? A. I think I ought to. It means the stuff itself, not checks, not promises to pay anybody, but the United States promises to pay silver, gold or greenbacks, that is cash money.

The plaintiff introduced one J. R. SAYRE, as a witness, who testified as follows:

I was receiving teller of Josiah Morris & Co. on January 8th, 1901.

Q. Do you remember, as receiving teller, to have taken in a check drawn by Josiah Morris & Co. in favor of John J. Cochran, county treasurer, on Josiah Morris & Co. for $111,109.58, about that time? A. I made no record of it at all, but I remember the check, I think Mr. Kohn handed it to me. He made out a deposit slip to the credit of John J. Cochran, treasurer, and handed it to me as teller, with the said check. It was handed to me as a deposit. I made no record as to whose credit the check went to, but being a check of such magnitude, I recollect that check and that it was deposited to the credit of Cochran, treasurer. I made no entry in the books of the bank as to

said check, that was the duty of the bookkeeper, but the check was accepted by the bank as a general deposit.

Q. When you received a deposit slip with checks, what did you do with them? A. I put them on my file, I entered them up to deposit on the credit side of my little blotter, and entered the check on the opposite side of my blotter.

Q. Did you enter up the name of the person to
127 whom the check was payable? A. No, sir; simply the amount.

Q. On the credit side you entered $111,109.58? A. Yes.

Q. And on the debit side you entered the same figures? A. Yes, like amount.

Q. You did not put Cochran's name on paper or book? A. No.

Q. And made no entry of any sort with reference to that deposit? Your duties ended on making the entry? A. Simply making the entry on debit and credit side to balance my books. I don't know where that book is.

The plaintiff introduced one F. M. BILLING, who testified as follows:

I am the owner of Josiah Morris & Co.'s bank. There was a check signed Josiah Morris & Co. on themselves in the sum of $111,109.58 deposited with Josiah Morris & Co., January 8th, 1901, to the credit of the county treasurer. I saw the entry on the books of the bank. I have forgotten how the check was drawn and how made payable. I don't know that I ever saw the face of the check. I paid two dividends aggregating 25 per cent to John J. Cochran on that deposit. The check was drawn by my direction.

I never made any entry of credit on said deposit. I knew the check had been given, while I did not see it.

The defendants separately moved to exclude the evidence of the witness as follows: "There was a check signed Josiah Morris & Co. on themselves in the sum of $111,109.58, deposited with Josiah Morris & Co., January 8th, 1901, to the credit of the county treasurer;" for the following reasons, viz.: a. Because said credit could only be proved by the person who made it and knew it to be correct. b. Because the witness never saw the check and knows nothing about the transaction, except that he saw the entry on the books. c. Because the witness shows that his only knowledge was that a check was to be given but

does not know in whose favor it was to be given nor in whose favor it was given; that he never saw the check and knows only that there was an entry of credit on the books which he did not make and does not know to be correct. d. There is better evidence of the facts testified to.

The Court overruled the said motion to exclude said evidence, and the defendants separately excepted to said actions of the Court in open court and in the presence of the jury.

128 The plaintiff rested.

The defendant introduced one WILLIAM BERNEY, who testified as follows:

I am president of the Fourth National Bank and was appointed receiver of Josiah Morris & Co., January 1st, 1903. After my appointment as receiver, I presented an order of the Court to Mr. Billing. He opened the vault, gave me the keys, turned over what was there, did not say that was all. I have collected $200.00 out of the assets of Josiah Morris & Co. As far as I have seen, the assets were of very little value.

The plaintiff moved to exclude the said testimony of the witness Berney, upon the ground that the said testimony was irrelevant and illegal, the Court sustained said motion, and each of the defendants, separately, then and there, in open court and before the jury retired, excepted to said action of the court.

This was all the evidence. Upon this evidence the Court in his general charge, charged the jury as follows, viz.: "If you believe the evidence, you will find a verdict for the plaintiff. You will render a special verdict in this cause. You will show by your verdict the amount still due, counting no interest, the amount still due, including interest from the 21st January, 1902, when this suit was commenced and the amount due including interest from the date of the conversion, Jany. 8th, 1901."

Each of the defendants separately, in open court and before the jury retired, excepted to that part of said charge of the Court to the jury which directed said jury to find a verdict for the plaintiff.

The defendant, Fidelity & Deposit Company of Maryland,

requested the Court in writing to charge the jury as follows, viz.:

"1. That if they believe the evidence in this case, they will find a verdict in favor of said defendant." The Court refused to give the said charge to the jury and the Fidelity & Deposit Co. of Maryland, in open court and before the jury retired, excepted to said ruling of the court. The Fidelity & Deposit Company of Maryland requested the Court in writing to give to the jury the following charge, viz.:

"2. That if the jury believe the evidence, there can be no recovery against this defendant on the sixth count." The Court refused to give the said charge to the jury and the Fidelity & Deposit Co. of Maryland in open court and before the jury retired, excepted to said ruling of the Court.

The Fidelity and Deposit Co. of Maryland requested the Court in writing to charge the jury as follows:

"3. That if the jury believe the evidence there can be no recovery against this defendant under the 1st, 2d, 3d, 5th and 7th counts." The Court refused to give the said charge to the jury and the Fidelity & Deposit Co. of Maryland, in open court and before the jury retired, excepted to said action of the court.

The Fidelity & Deposit Co. of Maryland requested the Court in writing to give to the jury the following charge:

"4. That the measure of damages under the 8th count is the value of the check received." The Court refused to give the said charge and the Fidelity & Deposit Co. of Maryland, in open court and before the jury retired, excepted to said action of the court.

The Fidelity & Deposit Co. of Maryland requested the Court in writing, to charge the jury as follows:

"5. That the measure of damages under the 6th count is the value of the bonds parted with and if there be no evidence of said value, no recovery can be had." The Court refused to give the said charge, and the Fidelity & Deposit Company of Maryland, in open court and before the jury retired, excepted to said action of the Court.

The Fidelity & Deposit Co. of Maryland requested the Court in writing to charge the jury as follows:

"6. That the plaintiff, if entitled to recover at all, is not entitled to recover any interest." The Court refused to give the said charge, and the Fidelity & Deposit Co. of Maryland, in open

court and before the jury retired, excepted to said action of the Court.

The Fidelity & Deposit Co. of Maryland requested
130 the Court in writing to charge the jury as follows, viz.:

"7. That if the plaintiff is entitled to recover at all, it can recover interest only from the institution of this suit." The Court refused to give the said charge, and the Fidelity & Deposit Co. of Maryland, in open court and before the jury retired, excepted to said action of the Court.

The Fidelity & Deposit Co. of Maryland requested the Court in writing to charge the jury as follows:

"8. That the plaintiff cannot recover in this case of the Fidelity & Deposit Co.of Maryland exceeding the sum of eighty-three thousand, one hundred and thirty and 08/100 ($83,130.08) dollars." The Court refused to give the said charge, and the Fidelity & Deposit Co. of Maryland, in open court and before the jury retired, excepted to said action of the Court.

The Fidelity & Deposit Co. of Maryland requested the Court in writing to charge the jury as follows:

"9. That the plaintiff cannot, in any event, recover of the Fidelity & Deposit Co. of Maryland exceeding the sum of eighty-seven thousand, seven hundred and seventy-eight and 20/100 ($87,778.20) Dollars." The Court refused to give the jury the said charge, and the Fidelity and Deposit Co. of Maryland, in open court and before the jury retired, excepted to said action of the Court.

The defendant Cochran, requested the Court in writing to charge the jury as follows, viz.:

"1. That if they believe the evidence in this case, they will find a verdict in favor of said defendant." The Court refused to give the said charge to the jury and the defendant Cochran, in open court and before the jury retired, excepted to said ruling of the Court."

The defendant Cochran, requested the Court in writing to give to the jury the following charge, viz.:

"2. That if the jury believe the evidence, there can be no recovery against this defendant on the sixth count." The Court refused to give the said charge to the jury, and the defendant Cochran in open court, and before the jury retired, excepted to said ruling of the Court.

The defendant Cochran requested the Court in
131 writing to charge the jury as follows:

"3. That if the jury believe the evidence, there can be no recovery against this defendant under the 1st, 2d, 3d, 5th and 7th counts." The Court refused to give the said charge to the jury and the defendant Cochran, in open court and before the jury retired, excepted to said action of the Court.

The defendant Cochran, requested the Court in writing to give to the jury the following charge:

"4. That the measure of damages under the 8th count is the value of the check received." The Court refused to give the said charge and the defendant Cochran, in open court and before the jury retired, excepted to said action of the Court.

The defendant Cochran, requested the Court in writing to charge the jury as follows:

"5. That the measure of damages under the 6th count is the value of the bonds parted with, and if there be no evidence of such value, no recovery can be had." The Court refused to give the said charge, and the defendant Cochran, in open court and before the jury retired, excepted to said action of the Court.

The defendant Cochran, requested the Court in writing to charge the jury as follows:

"6. That the plaintiff, if entitled to recover at all, is not entitled to recover any interest." The Court refused to give the said charge, and the defendant Cochran, in open court and before the jury retired, excepted to said action of the Court.

The defendant Cochran, requested the Court in writing to charge the jury as follows, viz.:

"7. That if the plaintiff is entitled to recover at all, it can recover interest only from the institution of this suit." The Court refused to give the said charge, and the defendant Cochran, in open court and before the jury retired, excepted to said action of the Court.

The jury rendered the following verdict:

"We the jury find the issues in favor of the plaintiff, and, if, in the opinion of the Court, the plaintiff is entitled to interest on the money converted, from the time of the conversion, viz.: January 8th, 1901, we assess the damages of the plaintiff at one hundred and one thousand and seventeen dollars and ninety cents; but, if, in the opinion of the Court, the plaintiff is en-

titled to interest on the amount of money converted
132 from the time of the bringing of this suit, and not from the time of the conversion, we assess the damages of the plaintiff at ninety-two thousand dollars and forty-three cents; but, if in the opinion of the Court, the plaintiff is entitled to no interest on the amount of money converted, we assess the damages of the plaintiff at seventy-eight thousand four hundred and forty-four dollars and two cents."

A. P. WILSON,
Foreman."

Immediately upon the return of the said verdict into open court, the Fidelity & Deposit Company of Maryland moved the Court in writing "not to enter judgment against it for exceeding the sum of seventy-eight thousand, four hundred and forty-four dollars and two cents." The Court overruled the said motion, and the Fidelity & Deposit Co. of Maryland, then and there in open court, excepted to said action of the Court.

The Fidelity & Deposit Co. of Maryland then moved the Court in writing "not to enter judgment against it for exceeding the sum of ninety-two thousand and seventeen dollars and forty-three cents." The Court overruled the said motion, and the Fidelity & Deposit Co. of Maryland then and there, in open court, excepted to said action of the Court.

Immediately upon the return of the said verdict into open court, the defendant Cochran moved the Court in writing "not to enter judgment against him for exceeding the sum of seventy-eight thousand, four hundred and forty-four dollars and two cents." The Court overruled the said motion, and the defendant Cochran, then and there in open court, excepted to said action of the Court.

The defendant Cochran then moved the Court in writing "not to enter judgment against it for exceeding the sum of ninety-two thousand and seventeen dollars and forty-three cents." The Court overruled the said motion and the defendant Cochran then and there, in open court, excepted to said action of the Court.

Upon the rendering of the special verdict and after the overruling of the motions just above set forth as to the same, the defendants separately, in open court, objected to the rendition of any judgment upon said verdict for a sum exceeding seventy-

eight thousand, four hundred and forty-four dollars and two cents. The Court overruled the said objection, and each of the defendants separately and in open court, excepted to said ruling of the Court. After the overruling of said objection just above noted, each of the defendants separately objected to
133 the Court rendering a judgment upon the special verdict for a sum exceeding ninety-two thousand and seventeen dollars and forty-three cents. The Court overruled the said objection and each of the defendants separately and in open court excepted to said action of the Court.

The plaintiff then moved the Court in writing to render judgment in its favor against both defendants upon the special verdict in the sum of one hundred and one thousand and seventeen dollars and ninety cents. The defendants separately objected to the granting of said motion, the Court overruled said objection, granted the said motion of the plaintiff, and entered judgment in favor of the plaintiff for the sum of one hundred and one thousand and seventeen dollars and ninety cents, and each of the defendants separately, then and there in open Court, excepted to said action of the Court.

The defendants, Cochran and Fidelity & Deposit Co. of Maryland present this, their bill of exceptions, which is signed and sealed by the presiding judge within term time, and made a part of the record in this cause, this the 19th day of February, 1904.

THOMAS G. JONES,
Judge of Circuit & District Courts of United States, Middle District of Alabama, holding the Circuit Court and presiding in the trial of the above stated cause.

Filed this 19th day of February, 1904, in open court.
J. W. DIMMICK,
Clerk.

ASSIGNMENTS OF ERROR OF JOHN J. COCHRAN.

134 In the Circuit Court of the United States for the Middle District of Alabama.

County of Montgomery
vs.
John J. Cochran and the Fidelity & Deposit Company of Maryland.

Now comes John J. Cochran, one of the plaintiffs in error, by his attorneys, and files the following assignments of error.

1. The court erred in overruling the demurrer to the first count of the complaint.
2. The court erred in overruling the demurrer to the second count of the complaint.
3. The court erred in overruling the demurrer to the third count of the complaint.
4. The court erred in overruling the demurrer to the fifth count of the complaint.
5. The court erred in overruling the demurrer to the sixth count of the complaint.
6. The court erred in overruling the demurrer to the seventh count of the complaint.
7. The court erred in overruling the demurrer to the eighth count of the complaint.
8. The court erred in sustaining the demurrer to plea A.
9. The court erred in sustaining the demurrer to plea B.
10. The court erred in sustaining the demurrer to plea C.
11. The court erred in sustaining the demurrer to plea D.
12. The court erred in sustaining the demurrer to plea E.
13. The court erred in sustaining the demurrer to plea F.
14. The court erred in sustaining the demurrer to plea G.
15. The court erred in sustaining the demurrer to plea H.
16. The witness Billing testified "there was a check signed Josiah Morris & Company, on themselves in the sum of $111,-109.58, deposited with Josiah Morris & Company, January 8th, 1901, to the credit of the county treasurer." This witness also testified that he had never seen the check, although he
135 knew that it had been drawn. He had never made the entry of said deposit, but saw it on the books. The defendant, John J. Cochran moved to exclude the words above quoted, upon the following grounds, to-wit: a. Because said credit could only be proved by the person who made it and knew it to be correct. b. Because the witness never saw the

check and knew nothing about the transaction, except that he saw the entry on the books. c. Because the witness shows that his only knowledge was that the check was to be given, but does not know in whose favor it was to be given, nor in whose favor it was given. d. The witness never saw the check and knows only that there was an entry or a credit on the books, which he did not make and does not know to be correct. e. There was better evidence. The Court overruled the said motion, and the defendant, John J. Cochran, in the presence of the jury, excepted to said motion [action] of the Court.

17. The defendants asked the witness Kohn the following question, to-wit: "What amount of cash was there in the bank of Josiah Morris & Co. on the 8th and 9th of January, 1901?" The plaintiff objected to said question as calling for illegal and irrelevant testimony. The Court said he would hear the answer of the witness before ruling. The witness answered: "$35,000.00." The plaintiff moved the Court to exclude said answer as evidence, upon the ground that it was illegal and irrelevant testimony. The defendants stated that the object of offering the testimony was to show the condition of the bank on the day the check was given and upon the day afterwards. The Court sustained the said motion to exclude said testimony, and the defendant, John J. Cochran, in open court and before the jury retired, excepted to said action of the Court.

18. The defendants asked the witness, Kohn, the following question, to-wit: "How long did the $95,000 which Josiah Morris & Co. borrowed on the pledge of the bonds remain in the Western National Bank?" The plaintiff objected to said question, as calling for irrelevant and illegal testimony. The Court said he would hear the answer before ruling, and the witness answered: "I could not tell how long the credit remained with the Western National Bank, checks for several days were drawn against this credit. There were checks to Hubbard, cashier of Capital City Bank, for $7500, on the 10th of January, 1901; to Louis B. Farley, for $10,000 the same day; on the 11th of January, $11,000.00 to Union Bank of Nashville; on January 12th, National Park Bank, $18,000.00; on January 14th, Union Banking & Trust Co., $10,000.00; on the 8th and 9th of January, 1901, the credit given by the Western National Bank was not available." The plaintiff moved to exclude the answer, upon the ground that it was irrelevant and illegal. The defendant stated that the evidence was offered to show the condition of the bank and its insolvency. The Court sustained said motion to exclude said testimony, and

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the defendant, John J. Cochran, in open court and before the jury retired, excepted to said ruling of the Court.

19. The defendant asked the witness, Kohn, to what extent Josiah Morris & Co. was overdrawn in the Hanover National Bank on the 8th and 9th of January, 1901? The plaintiff objected to said question, the Court said he would hear the testimony before ruling. The witness testified that Josiah Morris & Co., on the dates asked about, were overdrawn in the Hanover National Bank in the sum of $85,000 to $95,000, and perhaps to the extent of $120,000. The plaintiff moved to exclude said answer, the Court granted said motion, and the defendant, John J. Cochran, in open court and before the jury retired, excepted to said action of the Court.

20. The following agreement was made: It was admitted, subject to objection as to legality and revelancy, that after the failure of Josiah Morris & Co. all creditors of Josiah Morris & Co. made with Josiah Morris & Co., an agreement in writing by which the time of payment by Josiah Morris & Co. of the amounts due to said creditors was extended, so that Josiah Morris & Co. would pay to each of said creditors the following percentages on their respective debts at the times mentioned, viz.: 12 1-2 per cent. July 1st, 1901; 12 1-2 per cent. Dec. 1st, 1901; 25 per cent. July 1st, 1902; 25 per cent. Jany. 1st, 1903, and 25 per cent. July 1st, 1903. That this agreement was made with Josiah Morris & Co. by Cochran, treasurer, by and with the consent of the board of revenue of Montgomery County, and by and with the consent of the Fidelity & Deposit Company of Maryland, but with the distinct understanding that said agreement, so made between Cochran and Josiah Morris & Co. should not in any manner affect or waive any right which either party had, at the time of making the said agreement, as to the prosecution or defense of any suit which might arise on this matter against the treasurer of the county or his surety; it is further agreed that the dividend agreed to be paid July 1st, 1901, was paid July 2d, 1901, to all the creditors of Josaih Morris & Co., and that on account of the road and bridge fund involved in this case, amounting to $104,592.42, there was paid to Cochran 12 1-2 per cent. amounting to $13,074.05, and that
137 dividends payable December 1st, 1901, was paid June 14th, 1902, to all creditors of Josiah Morris & Co., and that on account of the road and bridge fund involved in this case, amounting to $104,592.42, there was paid to Cochran 12 1-2 per cent. June 14th, 1902, amounting to $13,074.05, and that nothing has been paid since to Cochran or to any other person creditor of Josiah Morris & Co. This agreement

was entered into for the purpose of saving time in the production of formal proof, but the facts therein stated, except as to the two payments of $13,074.05 on the dates set out, were duly objected to by the plaintiff; and plaintiff moved to exclude the same on the ground that the said facts so set out are illegal and irrelevant as evidence. The Court sustained the said motion of the plaintiff and excluded from the jury the facts admitted to be true in the said agreement, except the facts not objected to. To ruling of the Court the defendant, Cochran, then and there, in in open court and before the jury retired, excepted to said ruling of the Court.

21. The defendants asked the witness, Allen: "Did you think at the time Kohn brought the receipt and got the bonds that he had deposited the check in the bank to the credit of Cochran, county treasurer?" The plaintiff objected to said question, on the ground that it called for irrelevant and illegal testimony, and that plaintiff could not be bound by what Allen thought. The Court said he would hear the answer before ruling, and the witness answered: "I can't say as to that. I, of course, thought the county treasurer was all right or would not have given the bonds. Q. What? A. If I had thought that the money was not in the county treasury all right, I would not have given up the bonds. The only way I thought Kohn had gotten the money was by depositing the check in the bank. The only way I knew he had the money was by his receipt. I thought Josiah Morris & Co. were solvent at the time of the delivery of the bonds. I thought the check was good. I did not take the check, it was not payable to me, but to John J. Cochran, treasurer; I had no right to it at all. I was bound to have a voucher in my office. The plaintiff then moved to exclude that part of the answer of the witness in which he said: "I thought Josiah Morris & Co. were solvent at the time of the delivery of the bonds. I thought the check was good," upon the same grounds of objection to the question. The Court granted the said motion, and excluded said answer as evidence. The defendant, John J. Cochran, then and there, in open court before the jury retired, excepted to said action of the Court.

138 22. The witness, Allen, was asked the following question: You parted with the bonds, you wanted a voucher in your office. At the time he brought the check, you, thinking the check given by a solvent bank, and being payable to Cochran as county treasurer, if he had brought the receipt at that time and handed you the check and receipt you would have given him the bonds? The plaintiff objected to so much of said question commencing with "at the time he brought the

check, you, thinking the check given by a solvent bank, and being payable to Cochran as county treasurer, if he had brought the receipt at that time and handed you the check and receipt you would have given him the bonds?" for the reason that the question called for illegal and irrelevant testimony. The Court said before ruling he would hear the answer of the witness. The witness then answered: "Certainly, I would on his receipt." The plaintiff moved to exclude said answer, the Court sustained said motion, and the defendant, John J. Cochran, then and there in open court and before the jury retired, excepted to said action of the Court.

23. The witness, Berney, testified: I am president of the Fourth National Bank and was appointed receiver of Josiah Morris & Co. Jany. 1, 1903. After my appointment as receiver, I presented an order of the Court to Mr. Billing. He opened the vault, gave me the keys, turned over what was there, did not say that was all. I have collected $200 out of the assets of Josiah Morris & Co. As far as I have seen, the assets were of very little value. The plaintiff moved to exclude said testimony of the witness, Berney, upon the ground that the said testimony was irrelevant and illegal. The Court sustained the said motion, and the defendant, John J. Cochran, then and there, in open court and before the jury retired, excepted to said action of the Court.

139 24. The Court charged the jury as follows: "If you believe the evidence you will find a verdict for the plaintiff. You will render a special verdict in this cause. You will show by your verdict the amount still due, counting no interest, the amount still due, including interest from the 21st of January, 1902, when this suit was commenced, and the amount due including interest from the date of the conversion, January 8th, 1901." The defendant, John J. Cochran, in open court, and before the jury retired, excepted to that part of the said charge of the Court in words as follows: "If you believe the evidence you will find a verdict for the plaintiff.

25. The defendant, John J. Cochran, requested the Court in writing to charge the jury as follows, viz.: "1. That if they believe the evidence in this case, they will find a verdict in favor of said defendant." The Court refused to give the said charge to the jury and the defendant, John J. Cochran, in open court and before the jury retired, excepted to said ruling of the Court.

This charge was asked upon the proposition that under the act approved Dec. 13th, 1900, introduced in evidence, Cochran, as treasurer of Montgomery County, was not responsible for any

part of the road and bridge fund until the same came into his hands, and upon the evidence that no money proceeds of said road and bridge fund ever came into the hands of said Cochran, as treasurer, nor into the hands of any one authorized by him. This charge was also asked upon the proposition that Cochran being treasurer of the plaintiff and the sole custodian of its money, the plaintiff could not maintain this suit and recover a judgment against the said Cochran for any of the funds of plaintiff which it was the duty of Cochran to keep, so long as said Cochran remained in the office of treasurer of the plaintiff.

26. The defendant, John J. Cochran, requested the Court in writing to give to the jury the following charge, viz.: "2. That if the jury believe the evidence there can be no verdict against this defendant on the sixth count." The court refused to give the said charge to the jury, and the defendant, John J. Cochran, in open court and before the jury retired, excepted to said ruling of the Court.

This charge is based upon the proposition that the 6th count charges that Allen, clerk of the board of revenue, parted with the $100,000 of bonds upon a false representation made to him, said Allen, that Cochran or his deputy had received from Josiah Morris & Co. the money for said bonds, and upon the
140 evidence of Allen and of Kohn, which shows that Allen did not have any such belief and did not part with said bonds upon such representation.

29. The defendant, John J. Cochran, requested the Court in writing to charge the jury as follows: "3. That if the jury believe the evidence there can be no recovery against this defendant under the 1st, 2nd, 3rd, 5th and 7th counts." The Court refused to give the said charge to the jury, and the defendant, John J. Cochran, in open court and before the jury retired, excepted to said action of the Court.

This charge was asked upon the hypothesis that as the evidence shows no money ever reached the hands of Cochran, he could not convert the same, and upon the further proposition that no proceeds of the bonds except the check drawn by and in the name of Josiah Morris & Co. ever reached the hands of Cochran, and that if any conversion occurred, it was of the check and not of the money.

28. The defendant, John J. Cochran, requested the Court in writing to give to the jury the following charge: "4. That the measure of damages under the 8th count is the value of the check received." The Court refused to give the said charge, and the defendant, John J. Cochran, in open court, and before the jury retired, excepted to said action of the Court.

This charge was asked upon the proposition that the 8th count seeks to recover of the defendants for the failure of Cochran to collect the check given as the proceeds of the bonds, and that the measure of damages for the failure to collect the said check must be what the said Cochran could have collected on said check had he acted with reasonable diligence.

29. The defendant, John J. Cochran, requested the Court in writing to charge the jury as follows: "5. That the measure of damages under the 6th count is the value of the bonds parted with, and if there be no evidence of said value, no recovery can be had." The Court refused to give said charge, and the defendant, John J. Cochran, in open court and before the jury retired, excepted to said action of the Court.

This charge was asked upon the proposition that the said 6th count charged that Allen, the clerk of the board of revenue, had parted with the $100,000 of road and bridge bonds upon the faith and representation that the money for said bonds had been received by the treasurer, and that said representa-
141 tion was false, and upon the further proposition that the measure of damages under such a count, must be the value of the thing, to-wit: the road and bridge bonds parted with upon the faith of the said representation, alleged to have been false.

30. The defendant, Cochran, requested the Court in writing to charge the jury as follows: "6. That the plaintiff, if entitled to recover at all, is not entitled to recover any interest." The Court refused to give the said charge, and the defendant, John J. Cochran, in open court and before the jury retired, excepted to said action of the Court.

This charge was asked upon the proposition that Cochran having been continuously, since the 1st of September, 1900, the treasurer of the plaintiff, and the sole custodian provided by law, of the money of the plaintiff, that the plaintiff could not recover interest from the said Cochran or his surety for the said money, for the reason that there was no one to whom the said Cochran could pay the said money and receive a discharge for the same.

31. The defendant, Cochran, requested the Court in writing to charge the jury as follows: "7. That if the plaintiff is entitled to recover at all, it can recover interest only from the institution of this suit." The Court refused to give the said charge, and the defendant, John J. Cochran, in open court and before the jury retired, excepted to said action of the Court.

This charge was asked upon the proposition that if the said Cochran and his sureties were liable for any interest, interest

only from the commencement of the suit could be recovered, for the reason, first, that no demand for the payment of the money had been made prior to the institution of the suit; and for the reason, second, that Cochran being by law the sole custodian of the money of the plaintiff, could not have discharged himself of liability for the said money before the commencement of the suit, as there was no one to whom he could legally pay the said money and obtain a discharge.

32. The jury returned the following verdict: "We, the jury, find the issues in favor of the plaintiff, and if, in the opinion of the Court, the plaintiff is entitled to interest on the money converted, from the time of the conversion, viz.: January 8, 1901, we assess the damages of the plaintiff at $101,017.90; but, if, in the opinion of the Court, the plaintiff is entitled to interest on the amount of money converted from the time of the bringing of this suit, and not from the time of the con-
142 version, we assess the damages of the plaintiff at $92,-000.43; but, if, in the opinion of the Court, the plaintiff is entitled to no interest on the amount of money converted, we assess the damages of the plaintiff at $78,444.02. A. P. Wilson, Foreman." The defendant, Cochran, immediately upon the return of said verdict into open court, moved the Court, in writing, "not to enter judgment against him for exceeding the sum of $78,444.02." The said motion was made by the said defendant upon the proposition that John J. Cochran, having been continuously, since the 1st day of September, 1900, the treasurer of the plaintiff, and being, by law, the sole custodian of the money of the plaintiff, neither said Cochran nor his surety, was responsible for interest on the said money, but only for the principal. Which motion the Court overruled, and the defendant, John J. Cochran, then and there in open court, excepted to said action of the Court.

33. Immediately upon the return of the special verdict and after the overruling of the motion shown in the assignment of error numbered 33, the defendant, John J. Cochran, moved the Court in writing "not to enter judgment against him for exceeding the sum of $92,017.32." This motion was made upon the proposition that neither Cochran nor his surety was liable for interest, except from the commencement of the suit in this case. The Court overruled the said motion, and the defendant, John J. Cochran, in open court, excepted to said action of the Court.

34. Upon the rendering of the special verdict and after the overruling of the motions just above set forth as to the same, the defendant, John J. Cochran, in open court, objected to the ren-

dition of any judgment upon said verdict for a sum exceeding $78,444.02. The Court overruled the said objection, and the defendant, John J. Cochran, in open court, excepted to said ruling of the Court.

35. After the overruling of said objection just above noted, the defendant, Cochran, objected to the Court rendering a judgment upon the special verdict in a sum exceeding $92,017.43. The Court overruled the said objection, and the defendant, Cochran, in open court, excepted to said action of the Court.

36. The plaintiff then moved the Court in writing to render judgment in its favor upon the special verdict in the sum of $10,017.90. The defendant, Cochran, objected to the granting of said motion. The Court overruled said objection, granted the said motion of the plaintiff, and entered judgment in favor of the plaintiff for the sum of $101,017.90, and the defendant, John J. Cochran, then and there, in open court, excepted to said action of the Court.

WM. W. HILL,
WILEY T. HILL,
Attys. for Cochran.

Filed this 19th day of February, 1904, in open Court.
J. W. DIMMICK,
Clerk.

Assignments of Error of Fidelity & Deposit Company of Maryland.

143 In the Circuit Court of the United States for the Middle District of Alabama.

County of Montgomery
vs.
John J. Cochran and the Fidelity & Deposit Company of Maryland.

Now comes Fidelity & Deposit Company of Maryland, one of the plaintiffs in error, by its attorneys, and files the following assignments of error:

1. The Court erred in overruling the demurrer to the first count of the complaint.

2. The Court erred in overruling the demurrer to the second count of the complaint.

3. The Court erred in overruling the demurrer to the third count of the complaint.

4. The Court erred in overruling the demurrer to the fifth count of the complaint.

5. The Court erred in overruling the demurrer to the sixth count of the complaint.

6. The Court erred in overruling the demurrer to the seventh count of the complaint.

7. The Court erred in overruling the demurrer to the eighth count of the complaint.

8. The Court erred in sustaining the demurrer to plea A.

9. The Court erred in sustaining the demurrer to plea B.

10. The Court erred in sustaining the demurrer to plea C.

11. The Court erred in sustaining the demurrer to plea D.

12. The Court erred in sustaining the demurrer to plea E.

13. The Court erred in sustaining the demurrer to plea F.

14. The Court erred in sustaining the demurrer to plea G.

15. The Court erred in sustaining the demurrer to plea H.

16. The witness, Billing, testified "there was a check signed Josiah Morris & Co. on themselves in the sum of $111,109.58, deposited with Josiah Morris & Company, January 8th, 1901, to the credit of the county treasurer. This witness
144 also testified that he had never seen the check, although he knew that it had been drawn. He had never made the entry of said deposit, but saw it on the books. The defendants, Fidelity & Deposit Company of Maryland moved to exclude the words above quoted, upon the following grounds, to-wit: a. Because said credit could only be proved by the person who made it and knew it to be correct. b. Because the witness never saw the check and knew nothing about the transaction, except that he saw the entry on the books. c. Because the witness shows that his only knowledge was that the check was to be given, but does not know in whose favor it was to be given, nor in whose favor it was given. d. The witness never saw the check and knows only that there was an entry of a credit on the books, which he did not make and does not know to be correct. e. There was better evidence. The Court overruled the said motion, and the defendant, Fidelity & Deposit Co. of Maryland, in the presence of the jury, excepted to said action of the Court.

17. The defendants asked the witness, Kohn, the following question, to-wit: "What amount of cash was there in the bank of Josiah Morris & Co. on the 8th and 9th of January, 1901?" The plaintiff objected to said question as calling for illegal and irrelevant testimony. The Court said he would hear the an-

swer of the witness before ruling. The witness answered: "$35,000.00." The plaintiff moved the Court to exclude said answer as evidence, upon the ground that it was illegal and irrelevant testimony. The defendants stated that the object of offering the testimony was to show the condition of the bank on the day the check was given and upon the day afterwards. The Court sustained the said motion to exclude said testimony, and the defendant, Fidelity & Deposit Co. of Maryland, in open court and before the jury retired, excepted to said action of the Court.

18. The defendants asked the witness, Kohn, the following question, to-wit: "How long did the $95,000.00 which Josiah Morris & Co. borrowed on the pledge of the bonds, remain in the Western National Bank?" The plaintiff objected to said question, as calling for irrelevant and illegal testimony. The Court said he would hear the answer before ruling, and the witness answered: "I could not tell how long the credit remained with the Western National Bank, checks for several days were drawn against this credit. There were checks to Hubbard, cashier of Capital City Bank, for $7,500, on the 10th of January, 1901; to Louis B. Farley, for $10,000, the
145 same day; on the 11th of January, $11,000.00 to Union Bank of Nashville; on January 12th, National Park Bank, $18,000.00; on January 14th, Union Banking & Trust Co., $10,000.00; on the 8th and 9th of January, 1901, the credit given by the Western National Bank was not available." The plaintiff moved to exclude the answer, upon the ground that it was irrelevant and illegal. The defendant stated that the evidence was offered to show the condition of the bank and its insolvency. The Court sustained said motion to exclude said testimony, and the defendant, Fidelity & Deposit Co., in open court and before the jury retired, excepted to said ruling of the Court.

19. The defendant asked the witness, Kohn, to what extent Josiah Morris & Co. was overdrawn in the Hanover National Bank on the 8th and 9th of January, 1901? The plaintiff objected to said question; the Court said he would hear the testimony before ruling. The witness testified that Josiah Morris & Co., on the dates asked about, were overdrawn in the Hanover National Bank in the sum of $85,000 to $95,000, and perhaps to the extent of $120,000. The plaintiff moved to exclude said answer, the Court granted said motion, and the defendant, the Fidelity & Deposit Co. of Maryland, in open court and before the jury retired, excepted to said action of the Court.

20. The following agreement was made: It was admitted,

subject to objection as to its legality and relevancy, that after the failure of Josiah Morris & Co. all creditors of Josiah Morris & Co. made with Josiah Morris & Co. an agreement in writing by which the time of payment by Josiah Morris & Co. of the amounts due to said creditors was extended, so that Josiah Morris & Co. would pay to each of said creditors the following percentages on their respective debts at the *times mentioned, viz.:* 12 1-2 per cent. July 1st, 1901; 12 1-2 per cent. Dec. 1st, 1901; 25 per cent. July 1st, 1902; 25 per cent. Jany. 1st, 1903, and 25 per cent. July 1st, 1903. That this agreement was made with Josiah Morris & Co. by Cochran, treasurer, by and with the consent of the board of revenue of Montgomery County, and by and with the consent of the Fidelity & Deposit Company of Maryland, but with the distinct understanding that said agreement, so made between Cochran and Josiah Morris & Co. should not in any manner affect or waive any right which either party had, at the time of making the said agreement, as to the prosecution or defense of any suit which might arise on this matter against the treasurer of the county or his surety; it is further agreed that the dividend agreed to be paid July 1st, 1901, was paid July 2d, 1901, to all the creditors of Josiah Morris & Co., and that on account of the road and bridge fund in-

146 volved in this case, amounting to $104,592.42, there was paid to Cochran 12 1-2 per cent. amounting to $13,074.05, and that dividend payable December 1st, 1901, was paid June 14th, 1902, to all creditors of Josiah Morris & Co., and that on account of the road and bridge fund involved in this case, amounting to $104,592.42, there was paid to Cochran 12 1-2 per cent. June 14th, 1902, amounting to $13,074.05, and that nothing has been paid since to Cochran or to any other person creditor of Josiah Morris & Co. This agreement was entered into for the purpose of saving time in the production of formal proof, but the facts therein stated, except as to the two payments of $13,074.05 on the dates set out, were duly objected to by plaintiff, and plaintiff moved to exclude the same on the ground that the said facts so set out are illegal and irrelevant as evidence. The Court sustained the said motion of the plaintiff and excluded from the jury the facts admitted to be true in the said agreement, except the facts not objected to. To this ruling of the Court the Fidelity & Deposit Co. of Maryland then and there, in open court and before the jury retired, excepted to said ruling of the Court.

21. The defendants asked the witness Allen: "Did you think at the time Kohn brought the receipt and got the bonds that he had deposited the check in the bank to the credit of

Cochran, county treasurer?" The plaintiff objected to said question, on the ground that it called for irrelevant and illegal testimony, and that plaintiff could not be bound by what Allen thought. The Court said he would hear the answer before ruling, and the witness answered: "I can't say as to that. I, of course, thought the county treasurer was all right, or would not have given the bonds. Q. What? A. If I had thought that the money was not in the county treasury all right, I would not have given up the bonds. The only way I thought Kohn had gotten the money was by depositing the check in the bank. The only way I knew he had the money was by his receipt. I thought Josiah Morris & Co. were solvent at the time of the delivery of the bonds. I thought the check was good. I did not take the check, it was not payable to me but to John J. Cochran, treasurer; I had no right to it at all. I was bound to have a voucher in my office. The plaintiff then moved to exclude that part of the answer of the witness in which he said "I thought Josiah Morris & Co. were solvent at the time of the delivery of the bonds. I thought the check was good," upon the same grounds of objection to the question. The Court granted the said motion, and excluded said answer as evidence. The defendant, Fidelity & Deposit Co. then and there, in
147 open Court, before the jury retired, excepted to said action of the Court.

22. The witness, Allen, was asked the following question: You parted with the bonds, you wanted a voucher in your office. At the time he brought the check you, thinking the check given by a solvent bank, and being payable to Cochran, as county treasurer, if he had brought the receipt at that time and handed you the check and receipt you would have given him the bonds? The plaintiff objected to so much of said question commencing with "at the time he brought the check, you, thinking the check given by a solvent bank, and being payable to Cochran, as county treasurer, if he had brought the receipt at that time and handed you the check and receipt you would have given him the bonds?" for the reason that the question called for illegal and irrelevant testimony. The Court said before ruling he would hear the answer of the wtiness. The witness then answered: "Certainly, I would on his receipt." The plaintiff moved to exclude said answer, the Court sustained said motion, and the defendant, the Fidelity & Deposit Co. of Maryland, then and there in open court and before the jury retired, excepted to said action of the Court.

23. The witness, Berney, testified: I am president of the Fourth National Bank and was appointed receiver of Josiah

Morris & Co., January 1st, 1903. After my appointment as receiver, I presented an order of the Court to Mr. Billing. He opened the vault, gave me the keys, turned over what was there, did not say that was all. I have collected $200 out of the assets of Josiah Morris & Co. As far as I have seen, the assets were of very little value. The plaintiff moved to exclude said testimony of the witness, Berney, upon the ground that the said testimony wa irrelevant and illegal. The Court sustained the said motion, and the defendant, the Fidelity & Deposit Co. of Maryland then and there, in open court, and before the jury retired, excepted to said action of the

148 Court.

24. The Court charged the jury as follows: "If you believe the evidence you will find a verdict for the plaintiff. You will render a special verdict in this cause. You will show by your verdict the amount still due, counting no interest, the amount still due, including interest, from the 21st of January, 1902, when this suit was commenced, and the amount due including interest from the date of the conversion, January 8th 1901." The defendant, Fidelity & Deposit Company of Maryland, in open court and before the jury retired, excepted to that part of the said charge of the Court in words as follows: "If you believe the evidence you will find a verdict for the plaintiff."

25. The defendant, Fidelity & Deposit Co. of Maryland, requested the Court in writing to charge the jury as follows, viz.: "1. That if they believe the evidence in this case, they will find a verdict in favor of said defendant." The Court refused to give the said charge to the jury and the Fidelity & Deposit Co. of Maryland, in open court, and before the jury retired, excepted to said ruling of the Court.

This charge was asked upon the proposition that under the act approved Dec. 13, 1900, introduced in evidence, Cochran, as treasurer of Montgomery County, was not responsible for any part of the road and bridge fund until the same came into his hands and upon the evidence that no money proceeds of said road and bridge fund ever came into the hands of said Cochran, as treasurer, nor into the hands of any one authorized by him. This charge was also asked upon the proposition that Cochran being treasurer of the plaintiff and the sole custodian of its money, the plaintiff could not maintain this suit and recover a judgment against the said Cochran for any of the funds of plaintiff which it was the duty of Cochran to keep, so long as said Cochran remained in the office of treasurer of the plaintiff.

26. The Fidelity & Deposit Co. of Maryland requested the

Court in writing to give to the jury the following charge, viz.: "2. That if the jury believe the evidence there can be no verdict against this defendant on the sixth count." The Court refused to give the said charge to the jury, and the Fidelity & Deposit Co. of Maryland, in open court, and before the jury retired, excepted to said ruling of the Court.

This charge is based upon the proposition that the 6th count charges that Allen, clerk of the board of revenue, parted with the $100,000 of bonds upon a false representation made to him,

149 said Allen, that Cochran or his deputy had received from Josiah Morris & Co. the money for said bonds, and upon the evidence of Allen and of Kohn, which shows that Allen did not have any such belief and did not part with said bonds upon such representation.

27. The Fidelity & Deposit Co. of Maryland, requested the Court in writing to charge the jury as follows: "3. That if the jury believe the evidence there can be no recovery against this defendant under the 1st, 2d, 3d, 5th and 7th counts." The Court refused to give the said charge to the jury and the Fidelity & Deposit Co. of Maryland, in open court, and before the jury retired, excepted to said action of the Court.

This charge was asked upon the hypothesis that as the evidence shows no money ever reached the hands of Cochran, he could not convert the same, and upon the further proposition that no proceeds of the bonds, except the check drawn by and in the name of Josiah Morris & Co., ever reached the hands of Cochran, and that if any conversion occurred, it was of the check and not of the money.

28. The Fidelity & Deposit Co. of Maryland requested the Court in writing to give to the jury the following charge: "4. That the measure of damages under the 8th count is the value of the check received." The Court refused to give the said charge and the Fidelity & Deposit Co. of Maryland, in open court, and before the jury retired, excepted to said action of the Court.

This charge was asked upon the proposition that the 8th count seeks to recover of the defendants for the failure of Cochran to collect the check given as the proceeds of the bonds, and that the measure of damages for the failure to collect the said check must be what the said Cochran could have collected on said check had he acted with reasonable diligence.

29. The Fidelity & Deposit Co. of Maryland requested the Court in writing to charge the jury as follows: "5. That the measure of damages under the 6th count is the value of the bonds parted with, and if there be no evidence of said value,

no recovery can be had." The Court refused to give said charge, and the Fidelity & Deposit Company of Maryland, in open court, and before the jury retired, excepted to said action of the Court.

This charge was asked upon the proposition that the said 6th count charged that Allen, the clerk of the board of revenue, had parted with the $100,000 of road and bridge bonds upon the faith and representation that the money for said
150 bonds had been received by the treasurer, and that said representation was false, and upon the further proposition that the measure of damages under such a count, must be the value of the thing, to-wit: the road and bridge bonds parted with upon the faith of the said representation, alleged to have been false.

30. The Fidelity & Deposit Co. of Maryland requested the Court in writing to charge the jury as follows: "6. That the plaintiff, if entitled to recover at all, is not entitled to recover any interest." The Court refused to give the said charge, and the Fidelity & Deposit Co. of Maryland, in open court, and before the jury retired, excepted to said action of the Court.

This charge was asked upon the proposition that Cochran having been continuously, since the 1st of September, 1900, the treasurer of the plaintiff, and the sole custodian provided by law, of the money of the plaintiff, that the plaintiff could not recover interest from the said Cochran or his surety for the said money, for the reason that there was no one to whom the said Cochran could pay the said money and receive a discharge for the same.

31. The Fidelity & Deposit Co. of Maryland requested the Court in writing to charge the jury as follows: "7. That if the plaintiff is entitled to recover at all, it can recover interest only from the institution of this suit." The Court refused to give the said charge, and the Fidelity & Deposit Co. of Maryland, in open court, and before the jury retired, excepted to said action of the Court.

This charge was asked upon the proposition that if the said Cochran and his sureties were liable for any interest, interest only from the commencement of the suit could be recovered, for the reason, first, that no demand for the payment of the money had been made prior to the institution of the suit; and for the reason, second, that Cochran being by law the sole custodian of the money of the plaintiff, could not have discharged himself of liability for the said money before the commencement of the suit, as there was no one to whom he could legally pay the said money and obtain a discharge.

32. The Fidelity & Deposit Co. of Maryland requested the Court in writing to charge the jury as follows: "8. That the plaintiff can not recover in this case of the Fidelity & Deposit Co. of Maryland exceeding the sum of eighty-three thousand, one hundred and thirty and 08/100 ($83,130.00) dollars." The Court refused to give the said charge, and the Fidelity & Deposit Co. of Maryland, in open court, and before the
151 jury retired, excepted to said action of the Court.

This charge was based upon the proposition that the bond executed by the Fidelity & Deposit Co. of Maryland, as surety, sued on in this suit, was in the sum of $120,000. and that on the 2d of August, 1902, the said Fidelity & Deposit Company of Maryland had paid to the plaintiff on account of the said bond, the sum of $36,869.92, and that there remained of the penalty of the bond only the sum of $83,130.08.

33. The Fidelity and Deposit Co. of Maryland requested the Court in writing to charge the jury as follows: "9. That the plaintiff can not in any event recover of the Fidelity & Deposit Co. of Maryland exceeding the sum of eighty-seven thousand, seven hundred and seventy-eight and 20/100 ($87,778.20) dollars." The Court refused to give the jury the said charge and the Fidelity and Deposit Co. of Maryland, in open court, and before the jury retired, excepted to said action of the Court."

This charge was based upon the proposition that the bond executed by the Fidelity & Deposit Co. of Maryland, as surety, sued on in this suit, was in the sum of $120,000, and that on the 2d of August, 1902, the said Fidelity & Deposit Company of Maryland had paid to the plaintiff on account of the said bond, the sum of $36,869.92, of which $32,221.80 was principal, and that there remained of the penalty of the bond only the sum of $87,778.20.

34. The jury returned the following verdict: "We, the jury, find the issues in favor of the plaintiff, and if in the opinion of the Court the plaintiff is entitled to interest on the money converted, from the time of the conversion, viz.: Jany. 8, 1901, we assess the damages of the plaintiff at $101,017.90; but, if, in the opinion of the Court, the plaintiff is entitled to interest on the amount of money converted from the time of the bringing of this suit, and not from the time of the conversion, we assess the damages of the plaintiff at $92,000.43; but, if, in the opinion of the Court, the plaintiff is entitled to no interest on the amount of money converted, we assess the damages of the plaintiff at $78,444.02. A. P. Wilson, Foreman." The Fidelity & Deposit Co. of Maryland, immediately upon the return of said verdict into open court, moved the Court, in writing, "not to

enter judgment against it for exceeding the sum of $78,444.02." The said motion was made by the said defendant upon the proposition that John J. Cochran, having been continuously, since the 1st day of September, 1900, the treasurer of the plaintiff, and being, by law, the sole custodian of the money of the plaintiff, neither said Cochran nor his surety, was responsible for interest on the said money, but only for the principal.

152 Which motion the Court overruled, and the Fidelity & Deposit Co. of Maryland, then and there, in open court, excepted to said action of the Court.

35. Immediately upon the return of the special verdict and after the overruling of the motion shown in the assignment of error numbered 35, the Fidelity & Deposit Company of Maryland moved the Court in writing "not to enter judgment against it for exceeding the sum of $92,017.32." This motion was made upon the proposition that neither Cochran nor his surety was liable for interest, except from the commencement of the suit in this case. The Court overruled the said motion, and the Fidelity & Deposit Company of Marylond, in open court, excepted to said action of the Court.

36. Upon the rendering of the special verdict and after the overruling of the motions just above set forth as to the same, the Fidelity & Deposit Co. of Maryland, in open court, objected to the rendition of any judgment upon said verdict for a sum exceeding $78,444.02. The Court overruled the said objection, and the Fidelity & Deposit Co. of Maryland, in open court, excepted to said ruling of the Court.

37. After the overruling of said objection just above noted, the Fidelity & Deposit Co. of Maryland objected to the Court rendering a judgment upon the special verdict in a sum exceeding $92,017.43. The Court overruled the said objection and the Fidelity & Deposit Co. of Maryland, in open court, excepted to said action of the Court.

38. The plaintiff then moved the Court in writing to render judgment in its favor upon the special verdict in the sum of $101,017.90. The Fidelity & Deposit Co. of Maryland objected to the granting of said motion. The Court overruled said objection, granted the said motion of the plaintiff, and entered judgment in favor of the plaintiff for the sum of $101,017.90, and the Fidelity & Deposit Co. of Maryland then and there, in open court, excepted to said action of the Court.

EDGAR H. GANS,
THOS. A. WHELAN,
THOS. H. WATTS,
ALEXANDER TROY,
Attys. for Fidelity & Deposit Co. of Md.

Filed this 19th day of February, 1904, in open Court.
J. W. DIMMICK,
Clerk.

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153 DEFENDANTS' PETITION FOR WRIT OF ERROR.

In the Circuit Court of the United States for the Middle District of Alabama.

County of Montgomery
vs.
John J. Cochran and Fidelity & Deposit Company of Maryland.

Now comes the defendant, John J. Cochran, by his attorneys, William W. Hill and Wiley T. Hill, and comes the defendant Fidelity & Deposit Company of Maryland, by its attorneys, Edgar H. Gans, Thomas A. Whelan, Thomas H. Watts and Alexander Troy, and complains that certain errors were committed in the proceedings in said cause and in the rendition of judgment therein, to the great prejudice of the said defendants, all of which will appear from the respective assignments of errors which are filed herewith.

Wherefore, the said defendants pray that a writ of error and supersedeas may issue in this behalf for the United States Circuit Court of Appeals for the Fifth District for the correction of errors so complained of and that a transcript of the record and proceedings and papers in said cause, duly authenticated, may be sent to the United States Circuit Court of Appeals.

EDGAR H. GANS,
THOS. A. WHELAN,
THOS. H. WATTS,
ALEXANDER TROY,
Attorneys for Fidelity & Deposit Co. of Maryland.

WM. W. HILL,
WILEY T. HILL,
Attorneys for John J. Cochran.

Allowed upon the execution of bond in the sum of One Hundred and Twenty Thousand Dollars, payable to County of Mont-

gomery in the manner and with the conditions prescribed by law.

THOS. G. JONES,
Judge of the Circuit Court of the United States for the Middle District of Alabama.

Filed Feby. 19th, 1904.

J. W. DIMMICK,
Clerk.

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154 SUPERSEDEAS BOND.

In the Circuit Court of the United States for the Middle District of Alabama.

County of Montgomery
vs.
John J. Cochran and the Fidelity & Deposit Company of Maryland.

Supersedeas Bond.

State of Alabama,
County of Montgomery.

Know all men by these Presents, That we, John J. Cochran, Fidelity and Deposit Company of Maryland, a corporation under the laws of the State of Maryland, and United States Fidelity and Guaranty Company, a corporation under the laws of Maryland, are held and firmly bound unto the County of Montgomery, plaintiff above named, in the sum of One Hundred and Twenty Thousand Dollars, to be paid to the County of Montgomery, to which payment, well and truly to be made, we bind ourselves and each of us, jointly and severally, and our and each of our heirs, administrators, executors and successors, firmly by these presents.

Sealed with our seals and dated this 18th day of February, 1904.

The condition of the above obligation is such that, whereas, heretofore, viz.: on the third day of February, 1904, the County of Montgomery recovered a judgment, in the Circuit Court of the United States for the Middle District of Alabama, against the above named John J. Cochran and Fidelity and Deposit Company of Maryland, and the said John J. Cochran and Fidelity and Deposit Company of Maryland have sued out a writ of

error and a supersedeas of said judgment to the United States Circuit Court of Appeals for the Fifth Circuit to reverse the said judgment and have obtained the said writ of error and supersedeas upon the execution of this bond.

Now, therefore, if the said John J. Cochran and Fidelity and Deposit Company of Maryland shall prosecute their said writ of error to effect and answer all damages and costs, if they fail to make good their plea, then the above obligation to be void; otherwise to remain in full force and effect.

JOHN J. COCHRAN.
By WM. W. HILL, his Atty.
FIDELITY & DEPOSIT CO. OF MD.
By THOS. H. WATTS, its Atty.
THE UNITED STATES FIDELITY & GUARANTY CO.
By JOS. M. HOLT,
T. SCOTT SAYRE, Attorneys in Fact.

Approved this Feby. 19th, 1904.
THOS. G. JONES, Judge, &c.

Filed Feby. 19, 1904.

J. W. DIMMICK,
Clerk.

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155 DEFENDANTS' WRIT OF ERROR.

The United States of America.

The President of the United States,

To the Honorable the Judges of the Circuit Court for the Middle District of Alabama—Greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said Circuit Court before you, or some of you, between the County of Montgomery, plaintiff, and John J. Cochran and the Fidelity & Deposit Company of Maryland, defendants, manifest error has happened to the great damage of the said defendants, John J. Cochran and Fidelity and Deposit Company of Maryland, as by their complaint appears. We being willing that error, if any hath been, should be duly corrected and full and speedy justice done to the parties aforesaid in

this behalf, do command you, if judgment be herein given, that then under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the United States Circuit Court of Appeals for the Fifth Circuit, together wtih this writ, so that you have the same at Montgomery in the State of Alabama, within thirty days from the date hereof, in the said United States Circuit Court of Appeals, to be then and there held, and the record and proceedings aforesaid being inspected, the said United States Circuit Court of Appeals may cause further to be done therein to correct the error, what of right and according to the laws and customs of the United States should be done.

Witness the Honorable Melville W. Fuller, Chief Justice of the United States, this the 19th day of Feby., in the year of our Lord, one thousand nine hundred and four (1904).

J. W. DIMMICK,
Clerk of the Circuit Court of the United States
for the Middle District of Alabama.

Allowed by:
THOS. G. JONES, U. S. Dist. Judge,
Holding U. S. Circuit Court for Middle Dist. of Alabama.

Filed Feby. 19, 1904.

J. W. DIMMICK,
Clerk.

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156 DEFENDANTS' CITATION AND SERVICE.

In the Circuit Court of the United States for the Middle District of Alabama.

County of Montgomery
vs.
John J. Cochran and Fidelity & Deposit Company of Maryland.

The President of the United States.

To the County of Montgomery and John G. Finley, William L. Martin and J. F. Stallings, its Attorneys—Greeting:

You are hereby cited and admonished to appear before the United States Circuit Court of Appeals for the Fifth Circuit, at

the City of Montgomery and State of Alabama, within 30 days from the date hereof, pursuant to a writ of error sued out and granted, filed in the office of the Clerk of the Circuit Court of the United States for the Middle District of Alabama, at Montgomery, in the State of Alabama, in the cause wherein the County of Montgomery is plaintiff, and John J. Cochran and Fidelity & Deposit Company of Maryland, are defendants, to show cause, if any there be, why the judgment rendered against the said John J. Cochran and Fidelity & Deposit Company of Maryland in said cause, in said writ of error mentioned, should not be corrected and why speedy justice should not be done to the parties in that behalf.

Witness the Honorable Melville W. Fuller, Chief Justice of the Supreme Court of the United States, this the 19th day of Feby., in the year of our Lord, one thousand nine hundred and four (1904).

THOS. G. JONES,
Judge of the Circuit & District Courts of the United States for the Middle District of Alabama.

Attest:
[Seal] J. W. DIMMICK, Clerk.

Service accepted Feby. 19th, 1904.

JNO. G. FINLEY,
J. F. STALLINGS,
WM. L. MARTIN,
Attorneys for County of Montgomery.

Filed Feby. 19th, 1904.

J. W. DIMMICK,
Clerk.

157 CLERK'S CERTIFICATE.

United States of America,
Middle District of Alabama, ss:

I, J. W. Dimmick, Clerk of the Circuit Court of the United States for the Middle District of Alabama, hereby certify the foregoing pages numbered 1 to 156, both inclusive, do contain a full, true and complete transcript of the record and proceedings in the case lately depending in said Court, wherein County of Montgomery was plaintiff, and John J. Cochran and Fidelity & Deposit Company of Maryland were defendants, as the same appears of record and on file in my office as such clerk.

In testimony whereof, I have hereunto set my hand and caused the seal of said Court to be affixed, at Montgomery, in said District, this the 23rd day of February, A. D. 1904.

[Seal] J. W. DIMMICK,
Clerk.

In the United States Circuit Court of Appeals for the Fifth Circuit.

JOHN J. COCHRAN ET AL., Plaintiffs in Error,
vs.
COUNTY OF MONTGOMERY, Defendant in Error.

Error to the circuit court of the United States for the middle district of the State of Alabama.

It is agreed that this cause may be heard at New Orleans and at as early a date as practicable. This February 23, 1904.

EDGAR H. GANS,
THOS. A. WHELAN,
THOS. H. WATTS AND
ALEXANDER TROY,
WM. W. HILL, AND
WILEY T. HILL,
Attorneys for Plaintiffs in Error.
JNO. G. FINLEY,
J. F. STALLINGS,
WM. L. MARTIN,
Attorneys for Defendant in Error.

The foregoing has the following indorsements, to-wit:
No. 1343. John J. Cochran *et al. vs.* County of Montgomery. Stipulation to submit at New Orleans. U. S. circuit court of appeals. Filed Mar. 3, 1904. Charles H. Lednum, clerk.

United States Circuit Court of Appeals, Fifth Circuit, November Term, 1903, March 28, 1904.

(Extract from Minutes.)

JOHN J. COCHRAN ET AL.
vs.
COUNTY OF MONTGOMERY. } No. 1343.

On this day this cause was regularly called, and after argument by Thos. H. Watts, Esq., for plaintiff in error, was continued until to-morrow for further hearing.

November Term, 1903, March 29, 1904.

(Extract from Minutes.)

JOHN J. COCHRAN ET AL. vs. COUNTY OF MONTGOMERY. } No. 1343.

On this day this cause came on for further hearing, and after argument by William L. Martin, Esq., for plaintiff in error. was submitted to the court.

November Term, 1903, April 5, 1904.

(Extract from Minutes.)

JOHN J. COCHRAN ET AL. vs. COUNTY OF MONTGOMERY. } No. 1343.

This cause came on to be heard on the transcript of the record from the circuit court of the United States for the middle district of Alabama.

On consideration whereof, it is now here ordered and adjudged, by this court, that the judgment of the said circuit court, in this cause be, and the same is hereby, affirmed.

It is further ordered and adjudged that the plaintiff in error, John J. Cochran and Fidelity & Deposit Company of Maryland, and the surety on the writ of error bond herein, the United States Fidelity & Guaranty Company, be condemned to pay the costs of this cause in this court, for which execution may be issued out of said circuit court.

April 5, 1904.

Filed 5 day of April, 1904.

CHARLES H. LEDNUM,
Clerk of the United States Circuit Court of Appeals.

United States Circuit Court of Appeals, Fifth Circuit, Term 1903–1904.

JOHN J. COCHRAN ET AL. vs. COUNTY OF MONTGOMERY. } No. 1343.

Error to the United States circuit court, middle district of Alabama.

Before Pardee, McCormick, and Shelby, circuit judges.

By the COURT: This case has heretofore been twice before this court. On this writ of error no new questions are raised except in

regard to the allowance of interest, and as to that the circuit court ruled correctly and its judgment should be affirmed; and it is so ordered.

November Term, 1903, April 9, 1904.

(Extract from Minutes.)

JOHN J. COCHRAN ET AL. *vs.* COUNTY OF MONTGOMERY. } No. 1343.

Ordered that mandate in this cause be stayed until the further order of court.

Assignment of Error of John J. Cochran and Fidelity and Deposit Company of Maryland.

In the United States Circuit Court of Appeals for the Fifth District.

JOHN J. COCHRAN and FIDELITY AND DEPOSIT COMPANY OF Maryland, Plaintiffs in Error, *vs.* COUNTY OF MONTGOMERY, Defendant in Error.

Now come John J. Cochran and The Fidelity & Deposit Company of Maryland, plaintiffs in error, by their attorneys, and file jointly and severally the following assignments in error.

1. The court erred in affirming the judgment of the circuit court in overruling the demurrer to the first count of the complaint.
2. The court erred in affirming the judgment of the circuit court in overruling the demurrer to the second count of the complaint.
3. The court erred in affirming the judgment of the circuit court in overruling the demurrer to the third count of the complaint.
4. The court erred in affirming the judgment of the circuit court in overruling the demurrer to the fifth count of the complaint.
5. The court erred in affirming the judgment of the circuit court in overruling the demurrer to the sixth count of the complaint.
6. The court erred in affirming the judgment of the circuit court in overruling the demurrer to the seventh count of the complaint.
7. The court erred in affirming the judgment of the circuit court in overruling the demurrer to the eighth count of the complaint.
8. The court erred in affirming the judgment of the circuit court in sustaining the demurrer to plea A.
9. The court erred in affirming the judgment of the circuit court in sustaining the demurrer to plea B.
10. The court erred in affirming the judgment of the circuit court in sustaining the demurrer to plea C.

11. The court erred in affirming the judgment of the circuit court in sustaining the demurrer to plea D.

12. The court erred in affirming the judgment of the circuit court in sustaining the demurrer to plea E.

13. The court erred in affirming the judgment of the circuit court in sustaining the demurrer to plea F.

14. The court erred in affirming the judgment of the circuit court in sustaining the demurrer to plea G.

15. The court erred in affirming the judgment of the circuit court in sustaining the demurrer to plea H.

16. The defendants in the circuit court asked the witness, Kohn, the following question, to-wit: "What amount of cash was there in the bank of Josiah Morris & Company on the 8th and 9th of January, 1901?" The plaintiffs objected to said question as calling for illegal and irrelevant testimony. The court said he would hear the answer of the witness before ruling. The witness answered:—"$35,000." The plaintiff moved the court to exclude said answer as evidence, upon the ground that it was illegal and irrelevant testimony. The defendants stated that the object of offering the testimony was to show the condition of the bank on the day the check was given and upon the day afterwards. The court sustained the said motion to exclude said testimony, and the defendants, John J. Cochran and The Fidelity & Deposit Company of Maryland, in open court and before the jury retired, severally excepted to said action of the court.

The circuit court of appeals erred in affirming the judgment of the circuit court in sustaining the motion to exclude said testimony.

17. The defendants asked the witness, Kohn, the following question, to-wit: "How long did the $95,000 which Josiah Morris & Company borrowed on the pledge of the bonds, remain in the Western national bank?" The plaintiff objected to said question, as calling for irrelevant and illegal testimony. The court said he would hear the answer before ruling, and the witness answered: "I could not tell how long the credit remained with the Western national bank, checks for several days were drawn against this credit. There were checks to Hubbard, cashier of Capital City bank, for $7500, on the 10th of January 1901; to Louis B. Farley, for $10,000 the same day; on the 11th of January, $11,000 to Union Bank of Nashville; on January 12th, National Park bank, $18,000; on January 14th, Union Banking & Trust Company, $10,000; on the 8th and 9th of January, 1901, the credit given by the Western national bank was not available." The plaintiff moved to exclude the answer, upon the ground that it was irrelevant and illegal. The defendants stated that the evidence was offered to show the condition of the bank and its insolvency. The court sustained said motion to exclude said testimony, and the defendants, John J. Cochran and The Fidelity & Deposit Company of Maryland, in open court and before the jury retired, severally excepted to said ruling of the court.

The circuit court of appeals erred in affirming the judgment of the circuit court in sustaining said motion to exclude said testimony.

18. In the circuit court, the defendants asked the witness Kohn to what extent Josiah Morris & Company was overdrawn in the Hanover national bank on the 8th and 9th of January, 1901. The plaintiff objected to said question; the court said he would hear the testimony before ruling. The witness testified that Josiah Morris & Company, on the dates asked about, were overdrawn in the Hanover national bank in the sum of $85,000 to $95,000 and perhaps to the extent of $120,000. The plaintiff moved to exclude said answer, the court granted said motion, and the defendants, John J. Cochran and The Fidelity & Deposit Company of Maryland, in open court and before the jury retired, severally excepted to said action of the court.

The circuit court of appeals erred in affirming the judgment of the circuit court in granting the motion to exclude this testimony.

19. In the circuit court, the following agreement was made: It was admitted, subject to objection as to its legality and relevancy, that after the failure of Josiah Morris & Company, all creditors of Josiah Morris & Company made with Josiah Morris & Company an agreement in writing by which the time of payment by Josiah Morris & Company of the amounts due to said creditors was extended, so that Josiah Morris & Company would pay to each of said creditors the following percentages on their respective debts at the times mentioned, viz. 12½ per cent. July 1st, 1901; 12½ per cent. December 1st, 1901; 25 per cent. July 1st, 1902; 25 per cent. January 1st, 1903, and 25 per cent. July 1st, 1903. That this agreement was made with Josiah Morris & Company by Cochran, treasurer, by and with the consent of the board of revenue of Montgomery county, and by and with the consent of the Fidelity and Deposit Company of Maryland, but with the distinct understanding that said agreement, so made between Cochran and *the* Josiah Morris & Company, should not in any manner affect or waive any right which either party had, at the time of making the said agreement, as to the prosecution or defense of any suit which might arise on this matter against the treasurer of the county or his surety; it is further agreed that the dividend agreed to be paid July 1st, 1901, was paid July 2nd, 1901, to all the creditors of Josiah Morris & Company, and that on account of the road and bridge fund involved in this case amounting to $104,592.42, there was paid to Cochran 12½ per cent, amounting to $13,074.05, and that dividend payable December 1st, 1901, was paid June 14th, 1902, to all creditors of Josiah Morris & Company, and that on account of the road and bridge fund involved in this case, amounting to $104,592.42, there was paid to Cochran 12½ per cent., June 14th, 1902, amounting to $13,074.05, and that nothing has been paid since to Cochran or to any other person creditor of Josiah Morris & Company. This agreement was entered into for the purpose of saving time in the production of formal proof, but

the facts therein stated, except as to the two payments of $13,074.05 on the dates set out, were duly objected to by plaintiff, and plaintiff moved to exclude the same on the ground that the said facts so set out are illegal and irrelevant as evidence. The court sustained the said motion of the plaintiff and excluded from the jury the facts admitted to be true in the said agreement, except the facts not objected to. To this ruling of the court, John J. Cochran and the Fidelity & Deposit Company of Maryland then and there, in open court and before the jury retired, severally excepted to said ruling of the court.

The circuit court of appeals erred in affirming the judgment of the circuit court in sustaining the motion of the plaintiff to exclude the aforesaid testimony.

20. In the circuit court, the defendants asked the witness, Allen: "Did you think at the time Kohn brought the receipt and got the bonds that he had deposited the check in the bank to the credit of Cochran, county treasurer?" The plaintiff objected to said question on the ground that it called for irrelevant and illegal testimony, and that plaintiff could not be bound by what Allen thought. The court said he would hear the answer before ruling, and the witness answered: "I can't say as to that. I, of course, thought the county treasurer was all right, or would not have given the bonds. Q. What? A. If I had thought that the money was not in the county treasury all right, I would not have given up the bonds. The only way I thought Kohn had gotten the money was by depositing the check in the bank. The only way I knew he had the money was by his receipt. I thought Josiah Morris & Company were solvent at the time of the delivery of the bonds. I thought the check was good. I did not take the check; it was not payable to me but to John J. Cochran, treasurer; I had no right to it at all. I was bound to have a voucher in my office. The plaintiff then moved to exclude that part of the answer of the witness in which he said "I thought Josiah Morris & Company were solvent at the time of the delivery of the bonds. I thought the check was good," upon the same grounds of objection to the question. The court granted the said motion and excluded said answer as evidence. The defendants, John J. Cochran and The Fidelity & Deposit Company of Maryland, then and there in open court, before the jury retired, severally excepted to said action of the court.

The circuit court of appeals erred in affirming the judgment of the circuit court in granting the said motion and excluding the said answer as evidence.

21. In the circuit court, the witness, Allen, was asked the following question: "You parted with the bonds, you wanted a voucher in your office. At the time he brought the check you, thinking the check given by a solvent bank, and being payable to Cochran, as county treasurer, if he had brought the receipt at that time and handed you the check and receipt you would have given him the bonds?" The plaintiff objected to so much of said question com-

mencing with "at the time he brought the check, you, thinking the check given by a solvent bank, and being payable to Cochran, as county treasurer, if he had brought the receipt at that time and handed you the check and receipt you would have given him the bonds?" for the reason that the question called for illegal and irrelevant testimony. The court said before ruling he would hear the answer of the witness. The witness then answered: "Certainly, I would on his receipt." The plaintiff moved to exclude said answer, the court sustained said motion, and the defendants, John J. Cochran and The Fidelity & Deposit Company of Maryland, then and there, in open court and before the jury retired, severally excepted to said action of the court.

The circuit court of appeals erred in affirming the judgment of the circuit court and sustaining the motion to exclude said answer, and in excluding said answer.

22. In the circuit court, the witness, Berney, testified: "I am president of the Fourth national bank and was appointed receiver of Josiah Morris & Company January 1st, 1903. After my appointment as receiver, I presented an order of the court to Mr. Billing. He opened the vault, gave me the keys, turned over what was there, did not say that was all. I have collected $200 out of the assets of Josiah Morris & Company. As far as I have seen, the assets were of very little value. The plaintiff moved to exclude said testimony of the witness, Berney, upon the ground that the said testimony was irrelevant and illegal. The court sustained the said motion, and the defendants, John J. Cochran and The Fidelity & Deposit Company of Maryland then and there in open court, and before the jury retired, severally excepted to said action of the court.

The circuit court of appeals erred in affirming the judgment of the circuit court in excluding the testimony of said witness, Berney.

23. In the circuit court, the court charged the jury as follows:— "If you believe the evidence you will find a verdict for the plaintiff. You will render a special verdict in this cause. You will show by your verdict the amount still due, counting no interest, the amount still due, including interest, from the 21st of January, 1902, when this suit was commenced, and the amount due including interest from the date of the conversion, January 8th, 1901." The defendants, John J. Cochran and The Fidelity & Deposit Company of Maryland, in open court and before the jury retired, severally excepted to that part of the said charge of the court in words as follows:—"If you believe the evidence, you will find a verdict for the plaintiff."

The circuit court of appeals erred in affirming that part of the charge of the circuit court in words as follows:— "If you believe the evidence, you will find a verdict for the plaintiff."

24. The defendants, John J. Cochran and the Fidelity & Deposit Company of Maryland, requested the court in writing to charge the jury as follows, viz:—

"1. That if they believe the evidence in this case, they will find

a verdict in favor of said defendants." The court refused to give said charge to the jury, and John J. Cochran and the Fidelity & Deposit Company of Maryland, in open court, and before the jury retired, severally excepted to said ruling of the court.

This charge was asked upon the proposition that under the act ap-roved December 13th, 1900, introduced in evidence, Cochran, as treasurer of Montgomery county, was not responsible for any part of the road and bridge fund until the same came into his hands and upon the evidence that no money proceeds of said road and bridge fund ever came into the hands of said Cochran, as treasurer nor into the hands of any one authorized by him. This charge was also asked upon the proposition that Cochran being treasurer of the plaintiff and the sole custodian of its money, the plaintiff could not maintain this suit and recover a judgment against the said Cochran for any of the funds of plaintiff which it was the duty of Cochran to keep, so long as said Cochran remained in the office of treasurer of the plaintiff.

The circuit court of appeals erred in affirming the refusal of the circuit court to charge the jury as follows:—"That if they believe the evidence in this case, they will find a verdict in favor of said defendants.

25. The defendants, John J. Cochran and The Fidelity & Deposit Company of Maryland requested the court, in writing, to give to the jury the following charge, viz: 2. That if the jury believe the evidence there can be no verdict against these defendants on the sixth count. The court refused to give the said charge to the jury, and the defendants, John J. Cochran and The Fidelity & Deposit Company of Maryland, in open court, and before the jury retired, severally excepted to said ruling of the court.

This charge is based upon the proposition that the sixth count charges that Allen, clerk of the board of revenue, parted with the $100,000 of bonds upon a false representation made to him, said Allen, that Cochran, or his deputy, had received from Josiah Morris & Company the money for said bonds, and upon the evidence of Allen and of Kohn, which shows that Allen did not have any such belief and did not part with said bonds upon such representation.

The circuit court of appeals erred in affirming the judgment of the circuit court in refusing to charge the jury as follows:—That if the jury believe the evidence, there can be no verdict against these defendants on the sixth count.

26. The defendants, John J. Cochran and The Fidelity & Deposit Company of Maryland, requested the court in writing to charge the jury as follows: 3. That if the jury believe the evidence there can be no recovery against these defendants under the 1st, 2nd, 3rd, 5th and 7th counts. The court refused to give the said charge to the jury, and John J. Cochran and the Fidelity & Deposit Company of Maryland, in open court, and before the jury retired, excepted to said action of the court.

This charge was asked upon the hypothesis that as the evidence shows no money ever reached the hands of Cochran, he could not convert the same, and upon the further proposition that no proceeds of the bonds, except the check drawn by and in the name of Josiah Morris & Company, ever reached the hands of Cochran, and that if any conversion occurred, it was of the check and not of the money.

The circuit court of appeals erred in affirming the action of the circuit court in refusing to charge the jury as follows:—That if the jury believe the evidence there can be no recovery against the defendants severally under the first, second, third, fifth and seventh counts.

27. The defendants, John J. Cochran and The Fidelity & Deposit Company of Maryland, requested the court in writing to give to the jury the following charge: "4. That the measure of damages under the eighth count is the value of the check received." The court refused to give the said charge, and John J. Cochran and the Fidelity & Deposit Company of Maryland, in open court, and before the jury retired, severally excepted to said action of the court.

This charge was asked upon the proposition that the eighth count seeks to recover of the defendants for the failure of Cochran to collect the check given as the proceeds of the bonds, and that the measure of damages for the failure to collect the said check must be what the said Cochran could have collected on said check had he acted with reasonable deligence.

The circuit court of appeals erred in affirming the action of the circuit court in refusing to give the jury the following charge:—"That the measure of damages under the eighth count is the value of the check received."

28. The circuit court of appeals erred in affirming the action of the circuit court in refusing to charge the jury as follows:—"That the plaintiff, if entitled to recover at all, is not entitled to recover any interest."

29. The circuit court of appeals erred in affirming the action of the circuit court in refusing to charge the jury as follows:—"That if the plaintiff is entitled to recover at all, it can recover interest only from the institution of this suit."

30. The Fidelity & Deposit Company of Maryland requested the court in writing to charge the jury as follows:—"That the plaintiff cannot recover in this case of the Fidelity & Deposit Company of Maryland exceeding the sum of eighty-three thousand, one hundred and thirty and 08/100 ($83,130.08) dollars." The court refused to give the said charge, and the Fidelity & Deposit Company of Maryland, in open court, and before the jury retired, excepted to said action of the court.

This charge was based upon the proposition that the bond executed by the Fidelity & Deposit Company of Maryland as surety, sued on in this suit, was in the sum of $120,000, and that on the 2nd day of August, 1902, the said Fidelity & Deposit Company of Mary-

land had paid to the plaintiff on account of the said bond, the sum of $36,869.92, and that there remained of the penalty of the bond only the sum of $83,130.08.

The circuit court of appeals erred in affirming the action of the circuit court in refusing to charge the jury as follows:—"That the plaintiff cannot recover in this case exceeding the sum of $83,130.08.

Wherefore the plaintiffs in error pray for a reversal of the judgment below.

EDGAR H. GANS,
THOS. A. WHELAN,
Attorneys for the Fidelity & Deposit Company of Maryland and John J. Cochran.

The foregoing has the following endorsements, to-wit:

In the United States circuit court of appeals for the fifth district. John J. Cochran and Fidelity & Deposit Company of Maryland, plaintiffs in error, *vs.* County of Montgomery, defendant in error. Assignment of error of John J. Cochran and Fidelity & Deposit Company of Maryland. Mr. Clerk Please file. Thomas A. Whelan, Edgar H. Gans, attorneys for plaintiffs in error. Filed 20 day of May, 1904, Charles H. Lednum, clerk of the United States circuit court of appeals.

Know all men by these presents, that we, John J. Cochran and Fidelity and Deposit Company of Maryland, as principals, and The United States Fidelity and Guaranty Company, as surety, are held and firmly bound unto The County of Montgomery in the full and just sum of two hundred thousand dollars, to be paid to the said County of Montgomery, its certain attorney, executors, administrators, or assigns; to which payment, well and truly to be made, we bind ourselves, our heirs, executors, and administrators, jointly and severally, by these presents.

Sealed with our seals and dated this sixth day of May, in the year of our Lord one thousand nine hundred and four.

Whereas, lately at a United States circuit court of appeals for the fifth circuit, in a suit depending in said court, between John J. Cochran and The Fidelity & Deposit Company of Maryland, plaintiffs in error, and The County of Montgomery, defendant in error, a judgment was rendered against the said plaintiffs in error, and the said plaintiffs in error having obtained a writ of error and filed a copy thereof in the clerk's office of the said court to reverse the judgment in the aforesaid suit, and a citation directed to the said The County of Montgomery, citing and admonishing it to be and appear at a Supreme Court of the United States, at Washington, within 30 days from the date thereof.

Now the condition of the above obligation is such, that if the said John J. Cochran and The Fidelity & Deposit Company of Maryland shall prosecute said writ to effect, and answer all damages and costs

if they fail to make their plea good, then the above obligation to be void; else to remain in full force and virtue.

JOHN J. COCHRAN. [SEAL.]

[CORPORATE SEAL.] FIDELITY & DEPOSIT COMPANY OF MARYLAND, [SEAL.]

By EDWIN WARFIELD, *Pres't.* [SEAL.]

HARRY NICODEMUS, *Sec'y.* [SEAL.]

Attest:

[CORPORATE SEAL.] THE UNITED STATES FIDELITY & GUARANTY CO., [SEAL.]

By H. V. D. JOHNS, *Vice President.* [SEAL.]

Attest: ALBERT H. BUCK, *Ass't Sec'y.*

Sealed and delivered in presence of as to John J. Cochran,

WILEY C. HILL.
WM. W. HILL.

As to the two corporations,

I. B. McDONALD.

Approved by

EDWARD D. WHITE,
Associate Justice of the Supreme Court of the United States.

STATE OF MARYLAND, *City of Baltimore,* } *ss:*

On this 6th day of May, A. D. 1904, before the subscriber, a notary public of the State of Maryland, in and for the city of Baltimore, duly commissioned and qualified, came Edwin Warfield, president, and Harry Nicodemus, secretary, of the Fidelity and Deposit Company of Maryland, to me personally known to be the individuals and officers described in, and who executed, the preceding instrument, and they each acknowledged the execution of the same, and being by me duly sworn severally and each for himself deposeth and saith, that they are the said officers of the company aforesaid, and that the seal affixed to the preceding instrument is the corporate seal of said company, and that the said corporate seal and their signatures as such officers were duly affixed and subscribed to the said instrument by the authority and direction of the said corporation.

In testimony whereof, I have hereunto set my hand and affixed my official seal, at the city of Baltimore, the day and year first above written.

FRED S. AXTELL,
Notary Public.

[SEAL.]

Commission expires May, 1904.

STATE OF MARYLAND, } ss:
City of Baltimore, }

On this 6th day of May, 1904, before me appears H. V. D. Johns, vice-president of the United States Fidelity and Guaranty Company, of Baltimore city, Maryland, with whom I am personally acquainted, who being by me duly sworn, says that he is vice-president of the United States Fidelity and Guaranty Company; that he knows the corporate seal of the company; that the seal affixed to the foregoing instrument is such corporate seal; that it was affixed by the order of the board of directors of said company; that he signed said instrument as vice-president of said company by like authority. The said H. V. D. Johns further says that he is acquainted with Albert H. Buck and knows him to be the ass't secretary of the said The United States Fidelity and Guaranty Company; that the signature of the said Albert H. Buck subscribed to the said instrument is the genuine handwriting of the said Albert H. Buck and was thereto subscribed by like order of the said board of directors.

My commission expires first Monday in May, 1906.

[SEAL.] A. D. PATRICK,
Notary Public.

STATE OF ALABAMA, }
Montgomery County. }

On this the 12th day of May, 1904, before the subscriber a notary public of the county of Montgomery and State of Alabama, duly commissioned and qualified, came John J. Cochran to me personally known to be the individual who executed the preceeding instrument — acknowledged the execution of same.

In testimony whereof I have hereunto set my hand and affixed my official seal in the city of Montgomery, county of Montgomery, and State of Alabama the day and year above written.

[SEAL.] WILEY C. HILL,
Notary Public in and for the County of Montgomery and State of Ala.

Whereas, the United States Fidelity and Guaranty Company, a corporation duly incorporated under the laws of the State of Maryland, has deposited with me its charter or articles of incorporation and the statement required by section 3 of an act of Congress approved August 13, 1894, and entitled "An act relative to recognizances, stipulations, bonds, and undertakings, and to allow certain corporations to be accepted as surety thereon;" and has satisfied me that it has authority under its charter to do the business provided for in said act, that it has a paid up capital of not less than $250,000.00 in cash or its equivalent, and that it is able to keep and perform its contracts;

Now, therefore, the said United States Fidelity and Guaranty Company is hereby granted authority to do business under said act in said State of Maryland and is also granted authority to do business under said act beyond the limits of said State in any judicial district of the United States in which it shall first have appointed an agent conformably to the provisions of section 2 of said act.

HOLMES CONRAD,
Acting Attorney-General.

Department of Justice, Washington, D. C., September 25, 1896.

[DEPARTMENT SEAL.]

DEPARTMENT OF JUSTICE,
[SEAL.] WASHINGTON, D. C., *Apr.* 1, 1904.

The annexed is a true copy of an original authorization to do business, issued by the Attorney General, under the act of Congress approved August 13, 1894.

Witness my hand and the seal of the department.

O. J. FIELD,
Chief Clerk.

Endorsements: No. 1343. John J. Cochran, *et al.*, *v.* county of Montgomery. Bond. Filed 20 day of May, 1904, Charles H. Lednum, clerk of the United States circuit court of appeals.

United States Circuit Court of Appeals for the Fifth Circuit.

I, Charles H. Lednum, clerk of the United States circuit court of appeals for the fifth circuit, do hereby certify that the foregoing 167 pages, numbered from A to 166, inclusive, contain a true copy of the record, assignment of errors and all proceedings had, including the opinion of the court, in the case of John J. Cochran, *et al.*, plaintiffs in error, *versus* County of Montgomery, defendant in error, No. 1343, as the same remains upon the files and records of said United States circuit court of appeals.

In testimony whereof, I hereunto subscribe my name and affix the seal of said United States circuit court of appeals, at the city of New Orleans, Louisiana, this 24th day of May, A. D. 1904.

[Seal United States Circuit Court of Appeals, Fifth Circuit.]

CHARLES H. LEDNUM,
Clerk of the United States Circuit Court of Appeals for the Fifth Circuit.

UNITED STATES OF AMERICA, ss:

The President of the United States to the honorable the judges of the United States circuit court of appeals for the fifth circuit, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said circuit court of appeals before you, or some of you, between John J. Cochran and The Fidelity & Deposit Company of Maryland, plaintiffs in error, and The County of Montgomery, defendant in error a manifest error hath happened, to the great damage of the said plaintiffs in error as by their complaint appears. We being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same in the said Supreme Court at Washington, within 30 days from the date hereof, that the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error, what of right, and according to the laws and customs of the United States should be done.

Seal of the Supreme Court of the United States.

Witness the Honorable Melville W. Fuller, Chief Justice of the United States, the 16th day of May, in the year of our Lord one thousand nine hundred and four.

JAMES H. McKENNEY,
Clerk of the Supreme Court of the United States.

Allowed to operate as a supersedeas on giving bond in the sum of $200,000.00, which said bond has been presented to me and approved this 16th day of May, A. D. 1904.

EDWARD D. WHITE,
Associate Justice of the Supreme Court of the United States.

It is hereby certified that a copy of this writ is this day lodged in the clerk's office for the use of the defendant in error, 20th day of May, 1904.

[Seal United States Circuit Court of Appeals, Fifth Circuit.]

CHARLES H. LEDNUM, *Clerk.*

Filed 20 day of May 1904

CHARLES H. LEDNUM,
Clerk of the United States Circuit Court of Appeals.

UNITED STATES OF AMERICA, ss:

To the County of Montgomery, Greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, at Washington, within 30 days from the date hereof, pursuant to a writ of error, filed in the clerk's office of the United States circuit court of appeals for the fifth circuit, wherein John J. Cochran and The Fidelity & Deposit Company of Maryland are plaintiffs in error and you are defendant in error, to show cause, if any there be, why the judgment rendered against the said plaintiffs in error as in the said writ of error mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness, the Honorable Edward D. White, associate justice of the Supreme Court of the United States, this 16th day of May, in the year of our Lord one thousand nine hundred and four.

EDWARD D. WHITE,
Associate Justice of the Supreme Court of the United States.

Service accepted May 19, 1904.

JNO. G. FINLEY,
JESSE F. STALLINGS,
WM. L. MARTIN,
Attorneys for Defendant in Error,
The County of Montgomery.

On this 19th day of May, in the year of our Lord one thousand nine hundred and four, personally appeared before me, the subscriber, Thomas H. Watts and makes oath that he delivered a true copy of the within citation to Wm. L. Martin, one of the attorneys for the County of Montgomery in the within stated case of John J. Cochran & Fidelity & Deposit Company of Maryland *v.* County of Montgomery.

THOS. H. WATTS.

Sworn to and subscribed the 19th day of May, A. D. 1904.

[Seal of A. S. Woolfolk, Notary Public, Montgomery Co., Ala.]

A. S. WOOLFOLK,
Notary Public.

Filed 20 day of May 1904

CHARLES H. LEDNUM,
Clerk of the United States Circuit Court of Appeals.

Endorsed on cover: File No. 19,377. U.S. circuit court of appeals, 5th circuit. Term No. 279. John J. Cochran and The Fidelity & Deposit Company of Maryland, plaintiffs in error, *vs.* The County of Montgomery. Filed May 31, 1904. File No. 19,377.

FILE COPY.

Office Supreme Court U. S.
FILED
OCT 10 1904
JAMES H. McKENNEY,
Clerk

Supreme Court of the United States,

OCTOBER TERM, 1904.

No. 279. 37.

JOHN J. COCHRAN AND THE FIDELITY AND DEPOSIT COMPANY OF MARYLAND,
Plaintiffs in Error,

vs.

THE COUNTY OF MONTGOMERY,
Defendant in Error.

ERROR TO THE CIRCUIT COURT OF APPEALS FOR FIFTH CIRCUIT.

Brief of
EDGAR H. GANS AND THOMAS A. WHELAN, *for Plaintiffs in Error,*
On Motion to Dismiss the Writ of Error.

IN THE

Supreme Court of the United States.

OCTOBER TERM, 1904. No. 279.

JOHN J. COCHRAN AND THE FIDELITY AND DEPOSIT COMPANY OF MARYLAND

vs.

THE COUNTY OF MONTGOMERY.

Brief of EDGAR H. GANS and THOMAS A. WHELAN for Plaintiffs in Error, on Motion to Dismiss the Writ of Error.

ERROR TO THE CIRCUIT COURT OF APPEALS FOR FIFTH CIRCUIT.

STATEMENT OF THE CASE.

This suit was brought in the City Court of Montgomery, a State Court in the State of Alabama, by the county of Montgomery, one of the counties of the State of Alabama, against John J. Cochran, a citizen of Alabama, and the Fidelity and Deposit Company of Maryland, a citizen of the State of Maryland, on a joint bond, the cause of action being joint.

The suit was brought on January 21, 1902. (Record, 5–13.) The complaint was demurred to. (Record, 13.)

On this state of the Record in the State Court on February 15, 1902, a petition was filed in the Circuit Court of the United States for the Middle District of Alabama by the Fidelity and Deposit Co. of Maryland, for a removal of the cause from the City Court of Alabama to the Circuit Court of the United States for the Middle District of Alabama, on the ground *of prejudice and local influence* (Record, 1–5.), and on the same day an order was signed by Judge Thomas G. Jones, Judge of said Circuit Court, directing a removal on the ground of *prejudice and local influence.* (Record, 16–7.)

The plaintiff then filed a petition in the Circuit Court to remand the cause mainly on the ground that no right of removal from a State to a Federal Court existed on the ground of prejudice and local influence unless all the defendants were citizens of a State other than the State in which the plaintiff was a citizen; in other words, that the diverse citizenship should extend to all the defendants. (Record, 18–20.)

The District Judge, Thomas G. Jones, overruled the motion to remand and filed an elaborate opinion, which is found reported in Montgomery Co. vs. Cochran, 116 Fed. Rep., 985.

The case then went to trial in the Circuit Court of the United States for the Middle District of Alabama, and resulted in a verdict for the plaintiff for $36,869.92, which was not disputed by the defendants. The plaintiff having lost its case in the disputed claim, amounting with interest to $101,017.90, sued out its writ of error to the Circuit Court of Appeals for the Fifth Circuit. The Court affirmed the jurisdiction of the Federal Court on the removal for prejudice and local influence, but reversed the case on the merits. Its opinion is found reported in Montgomery Co. vs. Cochran, 121 Fed. Rep,, 17.

The case went back for a second trial. On the second trial the plaintiff, in addition to the $36,869.92 recovered in the first trial and paid by the defendants, because the item was not disputed, secured a judgment for $67,103.05, which was less than the amount claimed. Upon this judgment cross writs of error were sued out from the Circuit Court of Appeals. The Circuit Court of Appeals decided all points in favor of the plaintiff, and remanded the case for a new trial. The opinion is found reported in Montgomery Co. vs. Cochran, 126 Fed. Rep., 456. The third trial was simply formal. A writ of error would have been sued out from the Supreme Court of the United States from this second judgment of the Circuit Court of Appeals, if the judgment had been final. But the judgment was interlocutory and directed a remand and a new trial. It was necessary, therefore, to go through the third trial in order that a final judgment could be secured. On this third trial the plaintiff secured a judgment for the full amount claimed, to wit, $101,017.90 (Record, 102-4); and from this judgment the defendants sued out their writ of error from the Circuit Court of Appeals, which Court affirmed the judgment—128 Fed. Rep. 1018—and thus for the first time was there a judgment against the defendants in the Circuit Court of Appeals on which a writ of error could be sued out from the Supreme Court of the United States.

Argument.

The sole point on this motion to dismiss the writ of error is this: *When a suit is brought by a citizen of Alabama on a joint cause of action against a citizen of Alabama and a citizen of Maryland as joint defendants, in a State Court of Alabama, and the case is removed to the Circuit Court of the United States on the ground of prejudice and local influence, is the*

judgment of affirmance of the Circuit Court of Appeals final, or does a writ of error lie from the Supreme Court of the United States?

We concede that the question is novel, and like all new questions may be considered as doubtful because new. For this reason counsel for the Plaintiffs in Error are preparing a petition for a writ of *certiorari*, which will be presented to this Court on October 24th next, and respectfully request the Court to suspend judgment on the application for the dismissal of the writ of error until after the motion for *certiorari* shall have been filed, as counsel for Plaintiffs in Error are fully persuaded that the case is one which should be reviewed in one form or the other by the Supreme Court of the United States.

The Act of Congress regulating the jurisdiction of the Circuit Court of Appeals, and prescribing the cases in which the judgments are final and those in which a writ of error or appeal lies to the Supreme Court, provides in Section 6, among other things, as follows:

"THE JUDGMENTS OR DECREES OF THE CIRCUIT COURTS OF APPEALS SHALL BE FINAL IN ALL CASES IN WHICH THE JURISDICTION IS DEPENDENT ENTIRELY UPON THE OPPOSITE PARTIES TO THE SUIT OR CONTROVERSY BEING ALIENS AND CITIZENS OF THE UNITED STATES OR CITIZENS OF DIFFERENT STATES." * * *

"IN ALL CASES NOT HEREINBEFORE, IN THIS SECTION, MADE FINAL, THERE SHALL BE OF RIGHT AN APPEAL OR WRIT OF ERROR OR REVIEW OF THE CASE BY THE SUPREME COURT OF THE UNITED STATES, WHERE THE MATTER IN CONTROVERSY SHALL EXCEED ONE THOUSAND DOLLARS BESIDES COSTS. BUT NO SUCH APPEAL SHALL BE TAKEN OR WRIT OF ERROR SUED OUT UNLESS WITHIN ONE YEAR AFTER THE ENTRY OF THE ORDER, JUDGMENT, OR DECREE SOUGHT TO BE REVIEWED."

Since this is not a case arising under the patent laws, the revenue laws, the criminal laws or an admiralty case, in all

of which the judgment of the Circuit Court of Appeals is also final, we have quoted from the Statute only that part which makes a judgment final when the jurisdiction is dependent entirely upon diverse citizenship, for with this part of the Statute we are alone concerned.

From an examination of the Statute it is apparent that a writ of error always lies from the Supreme Court of the United States, unless it falls within one of the excepted cases, where by the express terms of the law the judgment of the Circuit Court of Appeals is made final.

Does this case fall within any one of the exceptions?

The only exception applicable is contained in the language: "IN ALL CASES IN WHICH THE JURISDICTION IS DEPENDENT ENTIRELY UPON THE OPPOSITE PARTIES TO THE SUIT OR CONTROVERSY BEING" * * * "CITIZENS OF DIFFERENT STATES."

Hence the precise question may be stated as follows:

Is the jurisdiction in this case dependent entirely upon the opposite parties to the suit or controversy being citizens of different States?

If so, there is no writ of error; if not, the writ of error lies. Who are the opposite parties to the suit in this case?

The plaintiff is a citizen of the State of Alabama; of the defendants, one is a citizen of the State of Alabama, just as is the plaintiff, and the other is a citizen of the State of Maryland. The controversy is joint and not severable. This being the case, how can it be said that the jurisdiction is dependent entirely upon diverse citizenship? The rule of diverse citizenship has been frequently declared by this Court.

The Circuit Courts of the United States have original jurisdiction in cases of diverse citizenship. But the construction of the Judiciary Act by this Court has been uniform, to the effect that all the defendants must be citizens

of a State or States other than the State in which the plaintiff is a citizen. Here is a simple case in which the original jurisdiction of the Federal Court depends entirely or exclusively on diverse citizenship. The county of Montgomery could not sue John J. Cochran and the Fidelity and Deposit Company of Maryland in the Circuit Court of the United States in Alabama, for the reason that only one of the defendants would be a citizen of a State other than Alabama, the other being a citizen of Alabama. If in the case at bar the jurisdiction is dependent entirely on diverse citizenship, then it should be possible to have brought the suit originally in the Federal Court; for diverse citizenship, of itself, is always a ground of jurisdiction.

Again—removals are allowed from State Courts to the Federal Courts, solely, exclusively and entirely on the ground of diverse citizenship; that is, when diverse citizenship exists the removal is allowed as a matter of course and of right for that cause alone; but in such a case no one of the defendants can be a citizen of the State in which the plaintiff is a citizen.

Sewing Machine Cases, 18 Wall. 553.

Here is another case depending entirely on diverse citizenship. The case at bar could not have been removed on the ground of diverse citizenship entirely. But when a removal is ordered on the ground of prejudice or local influence, there is something more than diverse citizenship. Such a removable is allowable, even though one of the defendants is a citizen of the same State as the plaintiff, which proves conclusively that diverse citizenship is not and cannot be the entire or sole cause of jurisdiction. The counsel for the defendant in error simply mistates the fact when he alleges in his brief (page 11) that federal jurisdiction was invoked and assumed solely on the ground of diversity of

citizenship. It was invoked by the petition of the Fidelity and Deposit Company of Maryland, who, it is true, was a diverse citizen from the plaintiff, but upon the specific ground of prejudice and local influence, and by virtue of the removal the Federal Court secured jurisdiction not only of the Fidelity and Deposit Company of Maryland, but also over John J. Cochran, a citizen of Alabama, against whom it has rendered a judgment of over $100,000. If we had applied for a removal entirely on the ground of diverse citizenship, it is conceded we would not have secured it. The defendant in error is put in this position—he is obliged to concede that an application for removal on the ground of diverse citizenship alone would not have been granted, and yet he is contending that the federal jurisdiction in this case is dependent entirely on diverse citizenship. This position is manifestly self-contradictory.

It may be urged that the statute never intended to give parties a writ of error from the Supreme Court where the removal is for prejudice and local influence, because such a writ of error is manifestly denied in cases where the removal is solely for diversity of citizenship, and there seems no reason why one class should be preferred over the other.

But we are manifestly confined to the statute itself. A writ of error lies in all but the excepted cases, and Congress has seen fit to include in the exception giving finality to the judgment of the Circuit Courts of Appeals only those cases where the jurisdiction is dependent entirely on diversity of citizenship. Now it will not do to say that in the case at bar, where the jurisdiction does not depend entirely on diversity of citizenship, there should be no writ of error simply because it falls or seems to fall within the policy of the statute. The simple answer is that it is not within and cannot be brought within the language of the Act. Courts

are not authorized, we respectfully urge, to supply a *casus omissus*.

The real truth is, that removal for prejudice or local influence where one of the defendants is a citizen of the same State as the plaintiff, is an unusual and peculiar case which has not been embraced within any of the exceptions in the Act. It is not sufficient for the Court to come to the conclusion that if Congress had thought of this unusual case they would have made the judgment of the Circuit Court of Appeals in respect thereto final. The complete answer is that Congress has not, as a matter of fact, done so.

The more logical position for the defendant in error was that taken by it below, *e. g.*, that there can be no removal for prejudice or local influence unless all the defendants are citizens of a State or States other than the plaintiff's State; or, in other words, that there can be no removal for prejudice or local influence in any case which could not originally have been brought in the Federal Court. If this proposition were sound, then all removal cases except those in which there is a federal question, would be entirely dependent on diverse citizenship and the judgments of the Circuit Court of Appeals would be final in all of them that did not embrace also a Federal question apparent in the complaint. But we cannot understand the contention of one who concedes that the removal is proper when one of the defendants and the plaintiff are citizens of the same State and yet claims that the judgment of the Circuit Court of Appeals is final because the jurisdiction is dependent entirely on diverse citizenship. As we have said the case is anomolous and not provided for in any of the exceptions in the Act of Congress.

No great harm can result from this. There are very few cases in which actual prejudice or local influence can be shown, and the strength of the proof in this regard is always passed upon by the Federal Judges as the application for removal is made to them and they may grant or

refuse it in the exercise of their judgment. So that there is not any danger of the docket of the Supreme Court being crowded with cases like these. Congress can amend the law if it is deemed proper to prevent writs of error in such cases.

If there does not exist any right of removal for prejudice or local influence, when one of the defendants is a citizen of the same State as the plaintiff, then the Court below had no jurisdiction, and since "*on every writ of error or appeal the first and fundamental question is that of jurisdiction first in this Court, and then of the Court from which the record comes*"—

Continental Nat. Bank vs. Buford, 191 U. S. 120,

it becomes necessary to show that the removal in this case was proper and the jurisdiction of the Federal Court was acquired though not dependent entirely on diverse citizenship.

Has the Circuit Court jurisdiction on a removal for prejudice or local influence, at the instance of a Maryland defendant, when the plaintiff and another defendant are citizens of Alabama?

The question of law here involved has been discussed frequently, has led to great difference of opinion, and requires exhaustive analysis of the statutes and cases for its solution.

The removal statute as it now stands is the Act of March 3, 1887, as amended by the Act of August 13, 1888. The parts of this Act, material to this discussion, which will hereafter be called the Act of 1888, read as follows:

> "Sec. 1. That the Circuit Courts of the United States shall have original cognizance, concurrent with the Courts of the several States, of all suits of a civil nature, at common law or in equity, where the matter in dispute exceeds, exclusive of interest and costs, the sum or value

of two thousand dollars, and arising under the Constitution or laws of the United States, or treaties made, or which shall be made, under their authority, or in which controversy the United States are plaintiffs or petitioners, or in which there shall be a controversy between citizens of different States, in which the matter in dispute exceeds, exclusive of interest and costs, the sum or value aforesaid, or a controversy between citizens of the same State claiming lands under grants of different States, or a controversy between citizens of a State and foreign States, citizens, or subjects, in which the matter in dispute exceeds, exclusive of interest and costs, the sum or value aforesaid. * * *

"Sec. 2. That any suit of a civil nature, at law or in equity, arising under the Constitution or laws of the United States, or treaties made, or which shall be made, under their authority, of which the Circuit Courts of the United States are given original jurisdiction by the preceding section, which may now be pending, or which may hereafter be brought, in any State Court, may be removed by the defendant or defendants therein to the Circuit Court of the United States for the proper district.

"Any other suit of a civil nature, at law or in equity, of which the Circuit Courts of the United States are given jurisdiction by the preceding section, and which are now pending, or which may hereafter be brought, in any State Court, may be removed into the Circuit Court of the United States for the proper district by the defendant or defendants therein, being non-residents of that State.

"And when in any suit mentioned in this section there shall be a controversy which is wholly between citizens of different States, and which can be fully determined as between them, then either one or more of the defendants actually interested in such controversy may remove said suit into the Circuit Court of the United States for the proper district.

"And where a suit is now pending or may be hereafter brought, in any State Court, in which there is a controversy between a citizen of the State in which the

suit is brought, and a citizen of another State, any defendant, being such citizen of another State, may remove such suit into the Circuit Court of the United States for the proper district, at any time before the trial thereof, when it shall be made to appear to said Circuit Court that from prejudice or local influence he will not be able to obtain justice in such State Court or in any other State Court to which the said defendant may, under the laws of the State, have the right, on account of such prejudice or local influence, to remove said cause:

"Provided, That if it further appears that said suit can be fully and justly determined as to the other defendants in the State Court, without being affected by such prejudice or local influence, and that no party to the suit will be prejudiced by a separation of the parties, said Circuit Court may direct the suit to be remanded, so far as relates to such other defendants, to the State Court, to be proceeded with therein.

* * * * * *

"Whenever any cause shall be removed from any State Court into any Circuit Court of the United States, and the Circuit Court shall decide that the cause was improperly removed, and order the same to be remanded to the State Court from whence it came, such remand shall be immediately carried into execution, and no appeal or writ of error from the decision of the Circuit Court so remanding such cause shall be allowed."

The removal act in force prior to the Act of 1888, was the Act of 1875, by which "either party" was permitted to remove *the suit* into the Circuit Court of the United States for the proper district. This Act of 1875 did not provide for severable controversies or for prejudice and local influence. The prejudice and local influence statute was the Act of 1867, March 2d, found with some changes, in the Revised

Statutes, section 639, clause third, which continued in force until repealed by the Act of 1887.

Fisk vs. Henarie, 142 U. S. 459.
B. & O. R. R. vs. Bates, 119 U. S. 464.

This statute reads as follows:

> "When a suit is now pending, or may hereafter be brought in any State Court, in which there is controversy between a citizen of the State in which the suit is brought and a citizen of another State, and the matter in dispute exceeds the sum of five hundred dollars, exclusive of costs, such citizen of another State whether he be plaintiff or defendant, if he will make and file in such State Court an affidavit stating he has reason to and does believe that from prejudice and local influence, he will not be able to obtain justice in such State Court, may file petition for removal, etc."

The defendant in error contends that there can be no removal on the ground of prejudice or local influence, unless all the defendants are non-residents; the plaintiffs in error, on the contrary, maintain that any defendant, if he be a non-resident, may remove, even though his co-defendants are residents of the State in which the suit is brought.

The question is one of statutory construction dependent mainly upon the ordinary and usual meaning of the words used.

(a) "*Any defendant.*"

In the removal acts prior to 1888, there could be no removal unless all the defendants were citizens of another State. This was because the words used had received a settled construction from the time of the passing of the first judiciary act.

Sewing Machine Cases, 18 Wall. 553.
Vannevar vs. Bryant, 21 Wall. 41.
Myers vs. Swann, 107 U. S. 546.
Iron Co. vs. Ashburn, 118 U. S. 54.
Hancock vs. Holbrook, 119 U. S. 586.

By the Act of 1867, "when there is a controversy between a citizen of a State in which the suit is brought and a citizen of another State, * * * such citizen of another State, whether he be plaintiff or defendant * * * may remove."

Here the words "citizen of another State," "plaintiff," and "defendant," are words in the singular number describing a definite class. The words are not "citizen or citizens," "defendant or defendants," but one word in the singular number which comprehends a class, whether there be one or more persons in the class.

So in the Act of 1875, the language is "either party may remove," which has received the same construction.

But in the Act of 1888, great care is taken in the use of the language designating the persons who may remove.

Thus, in clause 1, as to cases arising under the laws of the United States and treaties, the language is "may be removed by the defendant or defendants therein," meaning thereby, may be removed by "the defendant," (if there be but one defendant) or "defendants," meaning thereby all the defendants (if there be more than one).

So in clause 2, which deals mainly with diverse citizenship, the language is, "by the defendant or defendants therein being non-residents of that State," which has received the same construction, except that they must not only all join in the removal, but must, by the express terms of the Act, all be non-residents.

It is important to observe that the construction of those phrases in clauses 1 and 2 requiring all the defendants to join in the removal, is based upon the ordinary and usual meaning of the words employed.

Thus, in Chicago vs. Martin, 178 U. S. 245, the Supreme Court, through Chief Justice Fuller, decided that as to those clauses, all the defendants must join because of the language of the section, "the defendant or defendants therein."

They say (page 247): "It thus appears on the face of the statute that if a suit arises under the constitution and laws of the United States, or if it is a suit between citizens of different States, the defendant, if there be but one, may remove, or the defendants, if there be more than one; but where there is a suit between citizens of different States and a separable controversy, then either one or more of the defendants may remove." * * *

"And in view of the language of the statute, we think the proper conclusion is that all the defendants must join in the application under either clause."

But, as intimated in this opinion, when we come to the third clause, relating to separable controversies, the language is different—"then either one or more of the defendants actually interested in such controversy may remove."

In clause 4, the one under consideration, relating to prejudice and local influence, the expression is "any defendant."

It seems impossible to give this expression the meaning—"all the defendants." Not only does "any defendant" mean one of several, in its natural and ordinary meaning, but this construction is strengthened, if that were possible, by its careful opposition to the phrase "the defendant or defendants" used in the same statute. It must be assumed that Congress knew how the expression, "the defendant," had been interpreted, and knew what it was about, when in one clause it gives the right of removal "to the defendant or defendants;" in another to "either one or more of the defendants actually interested;" and in another, to "any defendant."

(b) "*Any defendant being such citizen of another State.*"

Not only is the expression "any defendant" used, but "any defendant being such citizen of another State."

Why the expression "being such citizen of another State?"

In Montclair vs. Ramsdell, 107 U. S. 147, it is said:

> "It is the duty of the Court to give effect, if possible, to every clause and word of the statute, avoiding, if it may be, any construction which implies that the Legislature was ignorant of the meaning of the language it employed."

It must be remembered that under this clause 4 the plaintiff must be a citizen of the State in which the suit is brought. If the contention of the plaintiff in error be correct, then every defendant would of necessity be a citizen of another State, and if Congress wanted to give one of them the right to remove, it could be effectively accomplished by saying "any defendant" may remove. But Congress does not stop with "any defendant," but goes on with the description of the removing party—"any defendant being such citizen of another State." This added expression "being such citizen of another State" according to the construction of the defendant in error is entirely useless, meaningless and may be stricken from the statute without changing in any way the meaning of Congress. Evidently such construction is not sound. The words "being such citizen of another State" were intentionally put into the law to qualify the words "any defendant," to express a meaning which the statute would not have if they were omitted. The only possible conclusion is that under clause 4, in which the plaintiff must be a citizen of the State where the suit is brought, the defendants may be, some of them, citizens of the same State, and others, citizens of other States. This being the case, it is not true that "any defendant" may unqualifiedly remove, but only such defendant as is a non-resident. Any one of the non-residents may remove, but no resident defendant has the right. We press this inference upon the Court as conclusive. Either, under the prejudice and local influence clause, there may be resident and non-resident defendants, or the

clause "being such non-resident" must be stricken from the law as surplusage.

The expression "by the defendant or defendants therein, *being non-residents of that State*," occurs in the second clause of the section; but here it is necessary, as it refers to cases where the United States is a plaintiff or petitioner, and cases in which there shall be a controversy between citizens of different States. In cases where the United States is a plaintiff, the defendants may be citizens of the State where suit is brought, or of some other State, and therefore it is necessary to distinguish them in the statute if the right of removal is to be exercised by non-residents alone. So also, where there is diverse citizenship. Here, by the settled construction, all the defendants must be non-residents in order that there shall be any right of removal, but *the plaintiff need not be a citizen of the State in which the suit is brought.* Therefore, in a diverse citizenship suit, it may happen that all the defendants are residents of the State in which the suit is brought, *e. g.*, when citizens of Louisiana sue citizens of Alabama, in an Alabama Court; or all the defendants may be non-residents, *e. g.*, when citizens of Alabama, or of any other State, sue citizens of Maryland in an Alabama Court. Inasmuch as the right of removal is intended by Congress to apply only to non-residents of the State where the suit is brought, and not to resident defendants, it was necessary to use the phrase, "being non-residents of that State," to effectuate the intention; and the phrase in this second clause is not surplusage.

(c.) The intent to make a difference between clauses 1 and 2, and clauses 3 and 4, is further shown by the use of the word "suit" in the prior, and the word "controversy" in the latter.

In clauses 1 and 2: "Any suit of a civil nature at law or in equity * * * may be removed."

But in clause 3 the expression is, "When in any suit * * * there shall be a controversy."

And in clause 4: "When any suit is now pending * * * in which there is a controversy between, etc."

There seems to be a purpose to make a distinction between suit and controversy. In a suit between plaintiffs and several defendants, there may be a controversy smaller in its limits and scope than the suit, with some of the defendants, and which may be separable; (clause 3), or there may be a suit against all the defendants, in which there is a controversy against each of the defendants. This limited meaning would not be given to the word controversy ordinarily,

Sewing Machine cases, 18 Wall. 553,

but is undoubtedly the meaning when it occurs in the context containing the expression "any defendant being such citizen of another State."

See Fisk vs. Henarie, 32 Fed. Rep. 417.

In this case the Court was discussing the constitutionality of the right to remove when some of the defendants were residents. The Constitution of the United States, Art. 3, sec. 2, extends the judicial power to certain *cases* in law and equity, and then to certain *controversies*, *e. g.*, to controversies between citizens of different States.

The Court says in reference to this change of phraseology in the same section, (32 Fed. Rep., page 423):

> "The change in the language of this section from the use of the term 'cases' to 'controversies' is apparently deliberate and premeditated, and in case of an instrument so carefully prepared and considered as the Constitution of the United States cannot be regarded as fortuitous or without special significance. * * * A controversy between citizens of different States is

none the less a controversy because they are not the only parties to it. To confine the operation of the words 'controversies between citizens of different States' to the cases where the controversy is exclusively between citizens of different States, is to interpolate a word into the grant of judicial power which materially limits and restrains its operation, etc."

(d) *Controversy "wholly" between citizens of different States.*

A controversy between citizens of different States is none the less a controversy because they are not the only parties to it. The language might be given such construction if it stood alone. But in this Act the distinction is plainly made between a controversy which is *wholly* between citizens of different States and one which is not "*wholly*" between them. In the third clause of the second section, which relates to separable controversies, it is provided that where "there shall be a controversy which shall be *wholly* between citizens of different States, and which can be fully determined between them, etc."

In the fourth clause, relating to prejudice and local influence, there is no requirement that the controversy shall be *wholly* between citizens of different States. The natural interpretation, therefore is, that it may be partly between citizens of the same State and partly between citizens of different States, particularly when in the same clause is the expression "any defendant, being such citizen of another State, may remove."

(e) *The proviso.*

It is impossible to understand the proviso in the Act if our construction be not correct. It is provided, that after "any defendant" removes the entire case, the Circuit Court may remand the case to the State Court as to the "other defendants," if the suit can be justly determined as to them, unin-

fluenced by the prejudice or local influence, and no party will be prejudiced by a separation of the parties. Here is a plain distinction made between "any defendant being such citizen of another State," and the "other defendants." Who are these "other defendants?" If they also are "citizens of another State," there would be no possible reason for the United States Court to send them back to the State Court, for the United States Court would have its usual and ordinary jurisdiction over them by reason of diverse citizenship. The section evidently contemplates the existence of a state of things in which it would be proper and desirable that there should be two trials of the same controversy, one in the State Court and one in the United States Court. The trial in the United States Court is guaranteed to "any defendant, being such citizen of another State" who can show prejudice; but the Federal Court is directed to send the other defendants back to the State Court in the contingency stated above. Why? The only possible reason can be that the State Court is the natural and proper Court for the trial of these "other defendants," and this is so only when they are residents of the State in which the suit is brought.

(f) *General intent.*

It is argued that the general intent of the Act of 1888 was to restrict the jurisdiction of the Federal Courts. This is true, and it has restricted their jurisdiction in several ways. Now, only a defendant may remove; under clauses 1 and 2, the right of removal is restricted to cases over which the Circuit Court would have original jurisdiction (Tennessee vs. Union Bank, 152 U. S. 454), and under the local prejudice clause the controversy must be with a citizen of the State in which the suit is brought. All these changes in the prior law had the result of restricting the jurisdiction of the Circuit

Court. But this assumed intention of Congress cannot be given effect to the extent of ignoring the obvious language of the Act itself. When the language of the Act is plain, it is the best guide to the real intention of the law-making body.

(g) *The reason for the clause.*

Clause 4 does not give a right to removal in every case of prejudice or local influence. The right exists only where the plaintiff is a resident of the State in which the suit is brought. Such a plaintiff is supposed to be a gainer by the existence of prejudice or local influence, and non-resident plaintiffs are not. Why? Because the prejudice or local influence means prejudice or influence which operates in favor of residents, because they are residents, and against non-residents, simply because they are non-residents. It is a feeling for the home people against the stranger. It is not a special and peculiar feeling against one of the several defendant strangers on grounds personal to him, but manifestly a prejudice against the stranger or non-resident as such, based on local or State feelings. If this be so, and a case is brought in which there are resident and non-resident defendants, the prejudice and local influence, as above described, could operate only as against the non-residents. As to them, the plaintiff would have the advantage, and only as to them. This explains why "any defendant, being such citizen of another State," may remove, and also why the Circuit Court will remand the case as to the "other defendants."

The reasons which we have thus classified are set forth in many cases in the Federal Courts; and though it will expand the volume of the brief, we think it will be much more convenient for the Court, if we extract them somewhat *in extenso*.

Fisk vs. Henarie, 32 Fed. Rep. 417, decided October 26, 1887.

This suit was brought in Oregon; three defendants were citizens of Oregon, and three of California. The three non-resident defendants removed on the ground of local prejudice. The removal was held proper. The Court says:

> "As the law then stood before the passage of the Act of 1887, this action could not have been removed to the Court by either of the defendants; for some of them are citizens of Oregon, the same State as the plaintiff. But by the Act of 1887, the foundation of the right of removal is the mere pendency of the suit in a State Court between a citizen of the State in which it is brought and the citizen of another State. It is enough, if there is a suit pending in such Court, 'in which there is a controversy between a citizen of the State in which the suit is brought and a citizen of another State.' And while the right to remove such suit is in effect thereby denied to the plaintiff, it is not given to the defendants collectively, but to 'any' one of them 'who is a citizen of another State.' These material changes in the language of the Statute can only be considered, under the circumstances, as showing an intent on the part of Congress to restore the Act of 1867, in this respect, as it was before the compilation of the revised statutes. It is no longer necessary that the suit should be between persons of diverse citizenship. It is sufficient if there is a 'controversy involved' in the suit between two such persons, the one being a citizen of the State in which it is brought, whatever may be the citizenship of the other plaintiffs or defendants. Nor can the right of removal thus given to 'any' defendant having the prescribed citizenship, be construed to include all the defendants, and so be denied to 'any' unless 'all' have such citizenship." (Page 422.)

The Court then, after conceding that the general purpose of the Act was to restrain the jurisdiction of the Circuit Court, goes on further to say: "But be this as it may, no Court would be warranted, on the strength of such a sugges-

tion, in construing the phrase 'any' defendant to mean 'all the defendants, more or less."

It is to be noted that this case was appealed to the Supreme Court of the United States, and decided on the 4th of January, 1892. The case is quoted as Fisk vs. Henarie, 142 U. S. 459. After a full argument, the Court ruled that the removal was improper, because it was too late. And to this rule, Judges Harlan and Fields dissented. It is perfectly evident that there would have been no occasion to discuss the question of lateness if there were no right of removal at all, on the ground that some of the defendants were citizens of the State in which the suit was brought, nor would there have been any reason for the dissent.

Whelan vs. R. R. Company, 35 Fed. Rep. 849. Opinion by Judge, afterwards Justice Jackson, July 24, 1888.

This was a civil action for damages by a citizen of Ohio against three Ohio corporations and a New York corporation. The case was removed by the New York corporation on the ground of prejudice and local influence. On pages 855-858, the Court says:

> "The whole suit being removed by 'any' defendant having the requisite citizenship, and on making the proper showing to the Circuit Court as to his inability to obtain justice in the local Court on account of prejudice or local influence, 'if it further appear to said Court that said suit can be fully and justly determined as to the other defendants in the State Court, without being affected by such prejudice or local influence, and that no party to the suit will be prejudiced by a separation of the parties, said Court may direct the suit to be remanded so far as relates to such other defendants, to the State Court, to be proceeded with therein.' This last paragraph of the clause clearly implies that there may be defendants to a suit, and even necessary parties,

who are not entitled to remove the same, and it further contemplates and provides for a case in which the suit may be retained in the Circuit Court against a single defendant, and by the fair import of the language, such defendant must be the party who has effected the removal of the suit. The other 'defendants' as to whom a separation may be had, and the suit remanded under the conditions stated, cannot properly refer to the defendant at whose instance or upon whose application the removal was made. If all the defendants to the suit, as under the Act of 1867, are required to possess the requisite citizenship, and the local prejudice must exist as to all, and all must join in the petition for removal, before such removal can be properly allowed, what possible application, meaning, or effect can be given to this last paragraph of the clause? That construction of the clause would present this anomaly, that after all the defendants had applied for and obtained a removal of the suit on account of local prejudice, the Circuit Court could still separate and remove the suit so far as it relates to some of the said defendants, and because as to them it appeared there was no local influence or prejudice. The right to remove the suit is given to 'any' defendant being a citizen of the State other than that in which the suit is brought, when it is made to appear to the Circuit Court that 'he' cannot obtain justice because of local influence or prejudice. By what rule of construction is the language 'any defendant' to be interpreted as meaning all the defendants to the suit? The natural import of the words, and the whole structure of the clause, admit of no such interpretation without doing violence to the language employed.

"In Montclair vs. Ramsdell, 107 U. S. 147, it is said: 'It is the duty of the Court to give effect, if possible, to every clause and word of the statute, avoiding, if it may be, any construction which implies that the Legislature was ignorant of the meaning of the language it employed.' * * *

"It must be assumed that Congress, in the enactment of this clause of the Act, was aware of the fact

that under the construction placed upon the prior removal acts (except, perhaps, the Act of 1866), all the parties on the side seeking the removal were required not only to possess the requisite citizenship, but to join in the application for such removal. When, therefore, Congress declared that 'any defendant,' being a citizen of another State might remove the suit by making it appear that on account of prejudice and local influence he could not obtain justice, the well-settled rules of construction require the Court to presume that the Legislature understood and intended the full effect of such declaration, and meant not to confine the right of removal to all, but to extend it to 'any' defendant citizen of another State who could make it appear to said Court that local influence or prejudice would prevent him from obtaining justice in the local forum in a suit which involved controversy between himself and the plaintiff.'

"The clause under consideration is a distinct, separate and independent provision referring to a class of cases not embraced in or covered by the three preceding clauses of section 2. By the first clause of said section, the right of removal is given to the 'the defendant or defendants,' without reference to his or their citizenship. By the second clause, the removal may be had by 'the defendant or defendants' therein being non-residents of that State. * * *

"But when we come to the new provision in the fourth clause, the general terms, indicative of all the parties entitled to remove are dropped or changed, and the right of removal is given to any defendant. The language of this clause is essentially different from that of sub-division 3 of section 639, which allowed the removal on the petition of the non-resident 'plaintiff or defendant,' terms which properly described all the parties on the one side or the other of the suit, and required all on the removing side to be in a position to exercise the right and join in the petition. * * *

"It is true that the general intent and purpose of the Act of 1867 was to restrict the action of the Federal

Courts and such is the effect and operation of the new provision.

* * * * * *

"There is clearly an enlargement of the right to remove in respect to defendants who can show that from prejudice or local influence, he or they cannot obtain justice in the State Court."

The Court then shows that the local prejudice clause has no relation to the separable controversy clause, quoting—

Jefferson vs. Driver, 117 U. S. 272;
Iron Co. vs. Ashburn, 118 U. S. 54;

and then proceeds:

"It cannot properly be assumed that Congress intended to change this line of decisions, and to make the removal provided for in said clause depend upon the existence of a separable controversy between parties as well as local prejudice. This construction would be to confuse two grounds or causes of removal heretofore kept distinct and disconnected."

In Huskins vs. Cincinnati, 37 Fed. Rep. 507,

decided January 21, 1889, the Court, by Judge Key, says, speaking of this clause:

"It permits or authorizes removal, though some of the defendants may be residents or citizens rather of the State in which the plaintiff resides."

The same point was conceded in the case of—

Wilder vs. Iron Co., 46 Fed Rep. 676.

decided June 5, 1891, the opinion delivered by Chief Justice Fuller. That was a suit in equity in the State Court of Virginia. Some of the plaintiffs were citizens of Virginia; some of other States. Some of the defendants were residents of Virginia, and the removing defendant a

New Jersey corporation. The Court decided there could be no removal, because all the plaintiffs were not residents of the State in which the suit was brought.

The Court says (pages 682 and 3):

> "But the difficulty of this order of removal is that there is not a controversy within the intent and meaning of the Act, between citizens of the State in which the suit is brought, and a citizen of another State. Any defendant, being such citizen of another State, may remove; but it is essential that a controversy should exist between such citizen of another State and citizens of the State in which the suit is brought. Assuming that a single defendant, being a citizen of a State other than that in which the suit is brought, who is jointly sued with other defendants, citizens of the same State as the plaintiff, may remove the suit to the Circuit Court, upon making it appear to the Court that on account of local predjudice or local influence, he cannot obtain justice in the State Court or Courts, still the question remains whether this can be done when the plaintiffs are not all citizens of the State in which the suit is brought; being all concerned adversely to the non-resident defendant, who seeks to remove the case. * * * Granted that the area of removability was enlarged by the Act of 1887, inasmuch as any of the defendants may remove, still the rule under the Act of 1867 applies, that when the citizenship on the plaintiff's side of the suit is such as to prevent the removal under that Act, it is equally effective to defeat the right under the Act of 1887."

To the same effect is the case of—

Adelbert College vs. Western Reserve University, 47 Fed. Rep., 836-845,

decided by Judge Jackson, on September 10, 1891; and in the case of—

Hall vs. Chattanooga, 48 Fed. Rep., 599,

decided December 22, 1891, which was an equity suit by citizens of Tennessee, brought in Tennessee, against citizens

of the same State and also of the State of Ohio. The Court says, (page 604):

> "In this circuit it has been uninterruptedly held that when all the plaintiffs are citizens of one State, and the defendant is a citizen of another and different State, any such citizens may remove without regard to the citizenship of his co-defendants."

The same principle was decided in the case of—

City of Detroit vs. Detroit City Ry. Co., 54 Fed. Rep. 1,

the opinion being delivered by Judge Taft, and the decision made on January 5, 1893. In this case, the city of Detroit was plaintiff, and a citizen of Michigan and of New York defendants. The suit having been brought in Michigan, the New York citizen removed. The Court says:

> "It has been held by Judge Jackson, in Whelan vs. Ry. Co., 35 Fed. Rep. 849, and in Thouran vs. Ry Co., 38 Fed. Rep. 673, that under this Act, where all the plaintiffs in a State Court are citizens of the State where suit is brought, a single defendant being a citizen of another State, may remove the case into the proper United States Circuit Court, for prejudice or local influence, even though he is united as co-defendant with citizens of the same State as plaintiffs, and even though there is no separable controversy between the plaintiffs and the non-resident removing defendant. We understand the Chief Justice in the case of Wilder vs. Iron Co., 46 Fed. Rep, 676, to concede and assume the correctness of the view of Judge Jackson as given above. It follows that as the city of Detroit, the sole plaintiff here, is a citizen of Michigan, and the trust company, one of the defendants, is a citizen of New York, the order of removal, so far as the citizenship of the parties is concerned, was authorized by statute."

The same principle was held in the case of—

Haire vs. Rome Ry. Co., 57 Fed. Rep. 321,

decided by Pardee, Circuit Judge, and Newman, District Judge, March 14, 1891. This was a civil action, brought in Georgia, by a citizen of Georgia against two defendants, citizens of Georgia, and the third defendant, a citizen of Connecticut, who removed the case. The Court says (page 322):

> "In the first clause of this same section providing for the removal of suits 'arising under the Constitution or laws of the United States, or treaties,' the right to remove is given to 'the defendant or defendants therein.' In the second clause, providing for removal on the ground of citizenship generally, the right is given to 'the defendant or defendants therein.' The third clause relates to separable controversies, and then, coming to the fourth clause, the one now under consideration, the language is—'any defendant being such citizen of another State may remove.' * * * The difference in the language used in these clauses must have been understood by Congress, and the significance that would be attached to this difference well known. No other conclusion can be reached than that Congress intended in cases where it appeared that from prejudice or local influence a non-resident defendant would not be able to obtain justice in the State Courts, such defendant, notwithstanding the fact that other defendants were joined with him in the suit, should have the right to remove such suit into the Circuit Court of the United States. * * * Construing it within itself, and only viewing former legislation as far as it throws light on this, no room is left for doubt that cases like the one under consideration are removable."

A like decision was given in the case of Gann vs. Northeastern R. R., 57 Fed. Rep. 417, decided October 5, 1891, opinion by Lamar, Circuit Justice, and in the concurring opinion of Newman, Judge, on page 422, the case of Haire vs. R. R. Company, was especially reaffirmed. The principle was also decided in the case of—

Jackson & Sharp Co. vs. Pearson, 60 Fed. Rep. 113, decided on May 31, 1892, the opinion being given by Barr, Justice:

"The inquiry, therefore, must be whether, under the provisions of the fourth clause of the second section of the Act of 1888, all of the defendants must be citizens of States other than that of the plaintiff to give jurisdiction of a suit removed because of prejudice and local influence. This is a question that remains undecided by the Supreme Court, and the decisions of the Circuit Courts are in conflict. The Supreme Court has, however, decided that the limitation of two thousand dollars applies to cases removed under the fourth clause of the second section of the Act. * * *" On page 126, the Court says: "We construe this fourth clause of the second section of this Act as allowing any defendant, who is a citizen of another State than that in which a suit is brought where there is a controversy between a plaintiff or plaintiffs, and such defendant, although there may be co-defendants, who are citizens of the same State as the plaintiff or plaintiffs. It is a settled canon of construction, to give effect, if it can be done, to all the words of an enactment. If the construction of the able counsel be correct, that all the defendants in such suits must be citizens of States other than that of the plaintiff, the words in this clause, 'being such citizens of another State,' are unnecessary and meaningless, since only defendants by the express language of the clause, can remove. If, therefore, all the defendants must be citizens of another State than that of the plaintiff, why describe the defendants as 'any defendant being such citizen of another State'? Is there not a clear and distinct implication that there might be other defendants who were not citizens of another State? Again, if the diverse citizenship must exist as between all the defendants and all the plaintiffs, why the proviso in this clause, that if it appear the suit thus removed can be fully and justly determined as to the other defendants, in the State Court, without being affected by such prejudice or local influence, and that no party to the suit will be prejudiced by a separation of the parties, the Circuit Court may direct the suit to be remanded, so far as it relates to such other defendant, to the State Court? Is it to be assumed that the Circuit Court, having by order of removal, obtained juris-

diction over a suit in which the diverse citizenship exists, as between all the plaintiffs and all the defendants, is to determine whether the suit might not be fully and justly tried in the State Court, as to the other defendants who are citizens of another State, to the one in which it was originally brought, and if the Court determine it may be thus tried, as to the other defendants, citizens of another State, remand the suit as to them? This, too, whether the other defendants, citizens of another State, asked or desired a return to the State Court. Such a construction would indicate that as between the Federal and State Courts, the preference was to be given the State Court, even when the jurisdiction and laws had clearly conferred jurisdiction upon the Federal Court. But if we assume that this fourth clause means that suits might be removed from a State Court to a Federal Court, in which some of the defendants were not citizens of another State, but citizens of the same State as that of the plaintiff, we readily see the reason of the proviso. * * *

"The difference being, in respect to diverse citizenship, that in the third clause the controversy must be wholly between citizens of different States and one that can be fully determined as between them; and in the fourth clause the controversy must be between a citizen of the State in which the suit is brought and a citizen of another State, but need not be wholly between them. * * *

"The general result of the Act of 1887-88 has been to greatly diminish the jurisdiction of the Circuit Court, and it may be assumed that such was the general intention of Congress in its enactment, but we cannot assume such a purpose and then, in our endeavor to carry it out, ignore the obvious language of the Act itself. Although there have been dissents from one or more of the Circuit Courts from the conclusion arrived at by Judge Jackson in his able opinion of Whelan vs. R. R. Co., 35 Fed. Rep. 849, we think that opinion remains unanswered, and in his conclusion upon the question under consideration has not been either overruled or modified by the Supreme Court."

See also in the case of Bonner vs. Meikle, 77 Fed. Rep. 489, decided December 7, 1896, the opinion given by Hawley, Judge. The Court says:

> "Under the provisions of the Act of 1887-88, in order to entitle a defendant, who is sued in a State Court, of which he is not a citizen, to remove the case to the Circuit Court of the United States, it is not necessary when all the plaintiffs are citizens of the State where the suit is brought, that all the defendants should be citizens of another State, or that any of his co-defendants should join with him in the petition for removal. Any defendant possessing the requisite citizenship may remove the case upon a proper showing of the facts."

Again, the same principle was decided in

Bartlett vs. Gates, 117 Fed. Rep. 363,

the opinion delivered by Caldwell, Judge, on September 3, 1902:

> "Prejudice or local influence is made by the statute a ground for the removal of a cause from the State to the Federal Court. By the letter of the statute, as well as by the great weight of adjudicated cases, the non-resident defendants may remove the case."

This case was brought in Colorado; some of the defendants were citizens of Colorado, and other citizens of a State other than Colorado.

See also—Holmes vs. Lo. Ry Co., 125 F. 301.
Seaboard vs. North Car., 123 F., 629.

(h) *The contrary view.*

We have cited and given extracts from fourteen cases decided by the Federal Courts in favor of the proposition we are contending for. There are only four cases in which the principle was adopted that in predjudice and local influ-

ence cases all the defendants must be non-residents of the State in which the suit is brought.

Anderson vs. Bowers, 43 Fed. Rep. 321.
City of Terre Haute vs. Evansville, 106 Fed. Rep. 545.
Campbell vs. Milliken, 119 Fed. 982.
Weldon vs. Fritzlen, 128 Fed. 608, simply follow Anderson vs. Bowers.

There are a few dicta in other cases; but these are the only cases in which the question was raised and decided.

Anderson vs. Bowers, 43 Fed. Rep. 321, was decided in August 1890, and the opinion was delivered by Oliver P. Shiras, Judge, (not Justice George Shiras). The reasons given in the opinion are all combatted by the views heretofore set forth in this brief, and it is not necessary therefore to repeat the argument. It is worthy of remark, however, that the learned judge was very doubtful himself of the validity of his own conclusions. On page 322, he says:

> "It is urged in argument that the use of the words 'any defendant being such citizen of another State, may remove to' implies that there may be defendants, who are not citizens of another State, and yet the same may be removed if there is a defendant who is a citizen of another State. *It cannot be gainsaid that the words are susceptible of this construction.* * * *"

And on page 323:

> "*Admitting that there is doubt as to the proper construction of the Act*, it still follows that this Court should not retain the case as it is better to leave the case in the Court whose jurisdiction is undoubted."

This case was expressly cited in the case of Haire vs. Rome R. R. Co., 57 Fed. Rep. 321, decided by Judges Pardee and Newman, in 1891, and these learned judges expressly declined to follow it. (See page 323.)

The other case of *City of Terre Haute vs. Evansville, 106 Fed. Rep. 545*, places the decision on a different ground. As this ground has some dicta in its favor, and is adopted by *Moon on Removals*, section 189, it needs a critical examination.

In this case the plaintiff and one defendant were citizens of Indiana, and the Farmers Loan and Trust Company, defendant, was a citizen of New York, and removed the case. The Court said (page 548):

> "Hence this Court could not have taken original cognizance of the case for the want of the requisite diversity of citizenship between the plaintiff and the defendants."

And on page 550:

> "It is a suit in which, for want of the requisite diversity of citizenship, this Court could not have taken original cognizance, and, therefore, it cannot acquire jurisdiction of it by removal on the ground of prejudice or local influence."

Although this case was decided in 1901, the Court does not refer to or mention in any way any of the numerous cases already cited in this brief on the question. It refers to, and relies upon, as the only authority, three cases decided in the Supreme Court of the United States, which, of course, would be conclusive if they really decided the question, to wit—

Tennessee vs. Union Bank, 152 U. S. 454.
Railroad Co. vs. Davidson, 157 U. S. 201.
Re Pennsylvania Co., 137 U. S. 451.

The first two of these cases only decide that under clause 2 of section 2, it was necessary that the suit be one of which the Circuit Court would have original jurisdiction. This is quite plain upon the language of the law, which reads, "*any other suit of a civil nature at law or in equity of which the Circuit Courts of the United States are given jurisdiction by the the preceding section.*"

There remains then only the last case—*Re* Pennsylvania Co., 137 U. S., 451—and it is important to examine this case carefully, as upon the inferences supposed to be derivable from this case, the whole opposition to the construction we have been contending for has been built up.

Moon on Removals, sec. 189, 1 notes.
Note to Schwenk vs. Strong, 8 C. C. A. 96.
In re Cilley, 58 Fed. Rep. 977.
Malone vs. Rich. & D. Ry., 35 Fed. Rep. 625.

In the case of *Re* Pennsylvania Co., 137 U. S. 451, the suit was brought in a Connecticut Court by a citizen of Connecticut, against the Pennsylvania Company, a citizen Pennsylvania. It was removed by the latter on the ground of prejudice and local influence, but was remanded to the State Court upon a showing that the matter in dispute did not exceed $2,000. So that the real question was—may a removal be made under clause 4 of the Act unless the amount involved is over $2,000 in value?

On this point the Court says (Justice Bradley):

> "Here the first two clauses expressly require an amount exceeding two thousand dollars. The third clause, in referring to 'any suit mentioned in this section,' evidently means the two first clauses of the section, and of course is limited to cases in which the matter in dispute exceeds two thousand dollars. The fourth clause (the one in question) describes only a special case comprised in the preceding clauses. The initial words, 'And where,' are equivalent to the phrase, 'And when in any such case.' In effect they are tantamount to the beginning words of the third clause, namely: 'And when in any suit mentioned in this section.'"

It has been argued from this language that the Supreme Court meant to decide that clauses 3 and 4, the separable controversy clause, and the prejudice and undue influence

clause, were merely sub-clauses of one and two, and indicated only special cases included within clauses one and two; and since under clauses one and two, no cases could be removed except those of which the Circuit Courts would have original jurisdiction, removals in separable controversies and for prejudice and local influence, would be likewise restricted.

We think it not difficult to show by the authorities, and by the construction of the Statute, that such inference cannot be drawn from this case.

1st. *The authorities.*

The Supreme Court itself has had this question presented to it since 137 U. S., in such a way that it could easily have decided the point at issue if it thought 137 U. S. bore the construction now contended for by the plaintiff in error.

This case was decided December 22, 1890.

In *Fisk vs. Henarie, 142 U. S. 459*, decided on January 4, 1892, the suit was brought in Oregon by an Oregon plaintiff against three defendants who were citizens of Oregon, and three defendants, citizens of California, the latter of whom removed the case. The Supreme Court remanded the case, because the removal was too late. It is scarcely to be believed that the Supreme Court would have remanded this case upon a mere point of practice, if they thought 137 U. S. to decide that the case was not properly removed, because all of the defendants were not non-residents of the State in which the suit was brought.

Then later, in *Hanrick vs. Hanrick, 153 U. S. 192*, decided in 1894, the Court says: "Whether the Act permits one of two or more defendants to remove any case which he could not have removed under earlier statutes is a question upon which there have been conflicting decisions in the Circuit Courts, and upon which we are not now required to express a definitive opinion."

This citation shows that the Supreme Court in 1894 did not think it had decided the question in 1890, or any principle which would necessarily control the decision of the question one way or the other. They state it as an open question.

In the lower Courts it has been expressly decided that the Supreme Court in 137 U. S. had no intention to decide this question.

In *Wilder vs. Iron Company, 646 Fed. Rep. 676*, decided June 5, 1891, Chief Justice Fuller, who ordinarily writes the opinions in removal cases for the Supreme Court, assumed the correctness of the view that a non-resident defendant could remove, though joined with a resident defendant in the suit.

So in Hall vs. Chattanoogo, 48 Fed. Rep. 599, decided on December 22, 1891, Key, Judge, maintained the same principle though he quoted 137 U. S. fully in his opinion. (See page 602.)

So in Jackson and Sharp Company vs. Pearson, 60 Fed. Rep. 113, decided in 1892, the question as to the meaning and effect of 137 U. S. was elaborately argued, and it was decided that the opinion of Judge Jackson in Whelan vs. R. R. Co., 35 Fed. Rep. 849, "remains unanswered, and his conclusion upon the question under consideration has not been either overruled or modified by the Supreme Court." (See pages 124-5, 127.)

2d. *Construction of the statute.*

The Supreme Court does decide that the introductory words to the fourth clause "And where" are tantamount to the introductory words to the third clause, "And when in any suit mentioned in this section."

It is then argued that the suits mentioned in this section, by express terms, are only those suits "of which the Circuit

Courts of the United States are given original jurisdiction by the preceding section," and that therefore, no cases may be removed except they be cases over which the Circuit Court has original jurisdiction. In 137 U. S. where the only question was whether the amount in controversy should be over $2,000, the argument was comparatively simple. The whole tenor of the removal statutes and their history indicated that the jurisdictional amount of $2,000 was to be retained in all removal cases, and there was nothing in any other part of the statute to counterbalance, as to this jurisdictional amount, the fair inference which could be drawn from the introductory words, "And where."

But suppose there are, as to the question of diverse citizenship in cases of prejudice and local influence, words in the statute, which clearly show that the inference from the introductory words is not to prevail as to this special class of cases, would any Court be guided by the general inference from the introductory words or by the special words showing an exception? Suppose this fourth clause contained a statement to this effect, "The right of removal under this clause shall extend to a case where the defendants are both residents and non-residents of the State where the suit is brought," would any Court deny the right of removal to a non-resident defendant, who had as co-defendant a resident of the State, simply by virtue of the inference drawn from the introductory words, "And where?" Now the whole argument is that the expression actually contained in the fourth clause, "any defendant, being such citizen of another State," is equivalent to the supposed statement just cited.

The fallacy of the argument of Moon, and of the Federal Court, in City of Terre Haute vs. Evansville, 106 Fed. Rep. 545, is that they assume the inference from the introductory words, "And where," which was valid as to the jurisdictional amount, because of no countervailing words in the clause, is

also valid as to the citizenship of the parties, although as to this citizenship there are countervailing words in the clause which clearly express the sense of Congress. They argue that the two cases are alike when they are entirely different; so different that the second case, *e. g.*, as to citizenship, was not in the mind of the Supreme Court at all in 137 U. S.

There is a still more conclusive answer to this argument. The Supreme Court says, in 137 U. S., that the introductory words of the fourth clause "And were" are tantamount to the introductory words of the third clause, "And when in any suit mentioned in this section." Then it follows that if any suits are not removable under the fourth clause, because one defendant is a citizen of the State in which the suit is brought and another a citizen of another State, the same rule, by virtue of the equivalent introductory language, should apply to the third clause.

But it has been held by an unbroken current of authority that under the third clause there may be a removal, even though one defendant is a citizen of the State in which suit is brought and another a citizen of another State.

Ches. & Ohio Ry. Co. vs. Dixon, 179 U. S. 131.
Connell vs. Smiley, 156 U. S. 335.
Carothers vs. McKinley, 116 Fed. Rep. 951.
First Natl. Bank vs. Bridgeport Trust Co., 117 Fed. Rep. 969.
Sugar Creek Co. vs. McKell, 75 Fed. Rep. 34.
Lake Street Co. vs. Farmers Loan Co., 72 Fed. Rep. 804.
Vinal vs. Continental, 34 Fed. Rep. 228.

Mr. Moon felt the force of this argument. He felt that the third and fourth clauses must be governed by the same rule in this question, and accordingly he is consistent in his error and maintains against all the authorities that under

clause 3, all the defendants must be citizens of another State. But he does admit that Connell vs. Smiley, 156 U. S. 335, throws strong doubt upon the correctness of his view.

Moon on Removals, 397, section 138, note.

On the whole, we conclude that a non-resident of the State in which the suit is brought may remove for prejudice and local influence, even though sued with a resident defendant.

Constitutionally of the Grant of Judicial Power.

It is scarcely necessay to discuss this question. Whenever this question has been raised, it has been uniformly decided that under the constitution Congress has the power to give the Circuit Courts jurisdiction when one of the defendants is a resident and the other a non-resident.

Gaines vs. Fuentes, 92 U. S. 10.
Fisk vs. Henarie, 32 Fed. Rep. 417, 423.
Haire vs. Rome Ry, Co., 57 Fed. Rep. 321, 323.
Whelan vs. Ry. Co., 35 Fed. Rep. 849, 858-60.

In this last case, Judge Jackson discusses this point as follows (page 860):

> "The object which the constitutional grant of power was intended to secure was to protect the non-resident citizen against local prejudice which might injure or do him injustice. That object cannot be attained if non-resident defendants, all or any, are compelled to litigate in the forum of the plaintiff, where there exists local influence or prejudice which would prevent such defendant from obtaining justice. In every suit there is a controversy between the plaintiff and each of the defendants against whom relief is sought, or where, as the result of a judgment against him, any defendant is compelled to render something in favor of the plaintiff, which is controverted or disputed by such defendant."

Again, if the fourth clause is unconstitutional, as thus construed, the third clause would be invalid for the same reason. But the third clause has been applied by the Supreme Court of the United States in cases where some of the defendants were non-residents and others residents of the State in which the suit was brought.

Connell vs. Smiley, 156 U. S. 335.
Ches. and Ohio Ry. Co. vs. Dixon, 179 U. S. 131.

We respectfully insist, therefore, that the removal was proper; that the jurisdiction did not depend entirely upon diverse citizenship; that the judgment of the Circuit Court of Appeals is not final, and that a writ of error will lie from the Supreme Court.

EDGAR H. GANS,
THOMAS A. WHELAN,
Attorneys for Plaintiffs in Error.

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United States Supreme Court.

OCTOBER TERM, A. D., 1904.

JOHN J. COCHRAN AND THE FIDELITY AND DEPOSIT COMPANY OF MARYLAND,
Petitioners,

vs.

COUNTY OF MONTGOMERY, *Respondent.*

Petition and Brief for Writ of Certiorari to the Circuit Court of Appeals for the Fifth Circuit.

EDGAR H. GANS,
THOMAS A. WHELAN,
Counsel for Petitioners.

XVIII

IN THE

Supreme Court of the United States.

OCTOBER TERM, A. D. 1904.

JOHN J. COCHRAN and THE FIDELITY AND DEPOSIT COMPANY OF MARYLAND, *Petitioners,*	PETITION AND BRIEF FOR WRIT OF CERTIORARI TO THE CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT.
vs.	
COUNTY OF MONTGOMERY, *Respondent.*	

To the Honorable, the Justices of the Supreme Court of the United States:

Your petitioners, John J. Cochran and the Fidelity and Deposit Company of Maryland, respectfully show:

1. That this is a case in which a County Treasurer and the surety on his official bond have been held liable in the sum of $101,017.90, for having deposited in a bank which afterwards failed, a check received from his superior officers governing the county, which at the time it was received was worthless, and which he was obliged to receive from them. The details of the case, and its various trials, are as follows:

2. That on January 21, 1902, suit was brought by the county of Montgomery, a county of the State of Alabama, against John J. Cochran, the County Treasurer of Montgomery county, and a citizen of Alabama, and the Fidelity and Deposit Company of Maryland, a citizen of Maryland.

XVIII

This suit was brought upon the official bond of Cochran, Treasurer, the Fidelity and Deposit Company being surety on the bond. The suit was brought in the City Court of Montgomery, an Alabama Court, and was removed to the Circuit Court of the United States for the Middle District of Alabama, on petition of the Fidelity and Deposit Company of Maryland, on the ground of prejudice and local influence. (Record, 5, 12: 16.)

There was a motion to remand the case to the State Court, which the District Judge, Thomas G. Jones, overruled, and filed an elaborate opinion, which is found reported in Montgomery County vs. Cochran, 116 Fed. Rep. 985.

The case then went to trial in the Circuit Court of the United States for the Middle District of Alabama, and resulted in a verdict for the plaintiff for $36,869.92, which was not disputed by the defendants. The plaintiff having lost its case on the disputed claim (the road and bridge claim hereafter explained) amounting with interest, to $101,017.90, sued out its writ of error to the Circuit Court of Appeals for the Fifth Circuit. The Court affirmed the jurisdiction of the Federal Court on the removal for prejudice and local influence, but remanded the case on the merits. Its opinion is found reported in Montgomery county vs. Cochran, 121 Fed. Rep. 17.

The case went back for a second trial. On the second trial the plaintiff, in addition to the $36,869.92 recovered in the first trial, and paid by the defendants, because the item was not disputed, secured a judgment for $67,103.05, which was less than the amount claimed. Upon this judgment cross writs of error were sued out from the Circuit Court of Appeals. The Circuit Court of Appeals decided all points in favor of the plaintiff and remanded the case for a new trial. The opinion is found reported in Montgomery County vs. Cochran, 126 Fed. Rep. 456.

The third trial was simply formal. A writ of error would have been sued out from the Supreme Court of the United

States, from this second judgment of the Circuit Court of Appeals, if the judgment had been final. But the judgment was interlocutory, and directed a remand and new trial. It was necessary to go through the third trial in order that a final judgment could be secured. On this third trial the plaintiff secured a judgment for the full amount claimed, to wit, $101,017.90. (Record, 102-4.) And from this judgment the defendants sued out their writs of error from the Circuit Court of Appeals, which Court affirmed the judgment on April 5, 1904—128 Fed. Rep. 1019—and thus for the first time there was a judgment against the defendants in the Circuit Court of Appeals on which a writ of error could be sued out from the Supreme Court of the United States.

A writ of error was sued out from the Supreme Court of the United States on May 16, 1904, and was allowed by Mr. Justice White, only, however, for the purpose of having the question whether a writ of error would lie in such a case brought before the Supreme Court for decision. The case is No. 279 of the October Term, 1904. A motion to dismiss the writ of error was submitted by the defendant in error on October 11, 1904, and briefs on the question have been submitted by both sides.

3. The propriety of filing a petition for a *certiorari* when a writ of error is pending and undecided, is fixed by the precedents in this Court. In the case of *Security Trust Co. vs. William H. Dent*, 187 U. S. 237, a writ of *certiorari* was allowed in a case where there was a writ of error pending which this Court held had been improperly sued out, and a copy of the record theretofore filed under the writ of error was allowed to be taken as sufficient return to the *certiorari*. See also, *Ayres vs. Polsdorfer*, 187 U. S. 585. The reason for this is evident. When a writ of error is allowed by one of the justices of the Supreme Court, this allowance does not settle the question whether the writ was properly sued out. It only brings the question before the Supreme Court for decision. The Supreme Court might well, on motion,

dismiss the writ of error, and yet regard the case as one which should be heard on *certiorari*, and the presentation of the alternative modes of appellate jurisdiction at the same time is more convenient to both the Court and the parties.

3. The petitioners ask for the writ of *certiorari*, in the event of their writ of error being dismissed, for the following reasons:

(*a*) **The Circuit Court of Appeals refused to construe a Statute of Alabama and an Alabama contract in accordance with the law of Alabama, but applied to their construction the general law followed by the Federal Courts, which in this special matter is absolutely different from the Alabama law.**

(*b*) **That by so doing, the Circuit Court of Appeals has involved itself in an absolute contradiction which is apparent on the face of the opinion.**

(c) **The case involves a question of practice of great importance, which has not been decided. This question is as follows: When a case is decided in favor of a plaintiff on his application for writ of error to the Circuit Court of Appeals and the case is remanded, should not the defendant on this new trial be allowed on a repleader to file the same pleadings, so that the precise question decided by the Circuit Court of Appeals may be ultimately reviewed by the Supreme Court of the United States in the precise form in which they were decided by the Circuit Court of Appeals?**

We will proceed to discuss these three grounds for this application in the order stated.

A.

The Circuit Court of Appeals refused to construe a statute of Alabama and an Alabama contract in accordance with the law of Alabama, but applied to their construction the general law followed by the Federal Courts which, in this special matter, is absolutely different from the Alabama law.

John J. Cochran became county treasurer of the County of Montgomery on September 1, 1900. He filed his official bond for $120,000, with the Fidelity and Deposit Company of Maryland as surety, conditioned for the faithful discharge of the duties of his office. (Record, 105.)

According to the custom in Alabama, he did not personally attend to the duties of his office, but, being a farmer and living some distance from Montgomery, he appointed, by power of attorney, one John P. Kohn, a clerk in the banking house of Josiah Morris & Company, his deputy, who actually performed the duties of treasurer in Cochran's name. (Record, 108.)

The county monies as they came in the hands of Cochran, treasurer, were deposited in the banking house of Josiah Morris and Company, as was customary. This banking house failed on January 25, 1901, whereby the county funds were lost, whereupon suit was brought on the treasurer's bond. As to the general funds of the county lost by the failure, there was no controversy, and the plaintiff was allowed to recover without opposition in the first trial the amount of $36,869.92, representing the amount of the general funds of the county, with interest, lost by the failure of the bank, and this amount was immediately paid by the Fidelity and Deposit Company. The only controversy was over the *special road and bridge fund* also alleged to have been lost by the failure, which amounts, with ultimate interest, to $101,017.90.

Special Road and Bridge Fund.

The whole controversy in this case is over the *special road and bridge fund.* On September 1st, 1900, when John J. Cochran became treasurer and his bond became operative, only the ordinary duties of the treasurer were contemplated by all the parties interested. But on December 13th, 1900, over three months afterwards, the Legislature of Alabama passed a law to authorize the *Board of Revenue* of Montgomery county to issue bonds of said county for an amount

not to exceed $100,000, for the purpose of building and improving the public roads and bridges of the county. (Record, 106.)

The specific duties of the Board of Revenue and of the County Treasurer with reference to these bonds and their proceeds, were fixed by Section 4 of the Act, which reads, (italics ours):

"Sec. 4. Be it further enacted, That *the Board of Revenue* of said county are hereby authorized to negotiate and sell such bonds as are issued by them by virtue of this Act, but said bonds shall not be sold for less than par (100 cents on the dollar), and the proceeds of said bonds shall be paid over to and kept by the *treasurer* of said county and applied to pay for the building and improving of the public roads of the county upon a permanent and well considered system, and for erecting bridges in said county; such use, payment and application of said proceeds to be under the direction and by authority of said *Board of Revenue* of said county of Montgomery, *and the said county treasurer to be responsible for the safe keeping of all the proceeds accruing from the sale of said bonds, which may come into his hands in his official capacity, the same as for other county funds or moneys in his hands as such treasurer;* and there shall be no commission paid to county Treasurer for disbursing the funds accruing from the sale of the bonds named in this Act."

This special Act refers to the *Board of Revenue* and the *County Treasurer*. In the county of Montgomery these two officials dealt with the county finances. The *Board of Revenue* is the organized instrumentality by which the county governs the finances under the law; it stands for the county itself, and has all the powers of a Court of County Commissioners; it orders and directs with the property of the county, according to law.

Acts of Alabama, 1875, March 4th.
Acts of Alabama, 1877, Feb. 9th.

The *County Treasurer*, on the other hand, had the duty of receiving and keeping the money of the county, and disbursing the same on the orders of the *Board of Revenue*, and when any money is received by him, he must give one receipt to the person paying the money and a duplicate to the clerk of the Board of Revenue, without which no payment is valid.

Alabama Code, 1429, sub-div.
Act Feb. 28, 1889.

Under this *Special Act*, the duties of the Board of Revenue and the County Treasurer are carefully pointed out and distinguished.

(1) The *Board of Revenue*, which was the representative of the county and its governing body, was directed to:

(*a*) Negotiate and sell the bonds;

(*b*) Pay over the proceeds to the *Treasurer;* and

(*c*) Direct the expenditure of the proceeds in constructing roads and bridges.

(2) The *County Treasurer* was to be responsible for the safekeeping of all the proceeds accruing from the sale of the bonds which might *come into his hands in his official capacity*, the same as for other county funds, as moneys *in his hands* as such treasurer.

In other words, the *Board of Revenue* was to sell the bonds and get the proceeds. After getting the proceeds it was to hand them over to the Treasurer. When the Treasurer received the proceeds into his hands, he was to *safely keep them*, subject to the order of the *Board of Revenue*.

Now what happened?

The bonds were sold by the *Board of Revenue* on January 8, 1901, to Josiah Morris & Co., they being the highest bidders, for $111,109.58. They paid for them by a check drawn on themselves in the following form:—

"Montgomery County, Alabama, January 8, 1901.

Josiah Morris & Co.—Pay to the order of John J. Cochran, County Treasurer, one hundred and eleven thousand one hundred and nine and 58-100 dollars.

JOSIAH MORRIS & CO.
By Kohn."

This paper, though in the form of a check, was really in legal effect a promissory note, because drawn on themselves. Kohn, it must be remembered, was both a clerk of Josiah Morris & Co. and the deputy of Cochran, treasurer. This check was taken to the Board of Revenue by Kohn, as clerk for Josiah Morris & Co. and received by the Board through its clerk, Charles A. Allen. (Record, 110.)

Since the check represented the proceeds of the bonds, and as the real custodian of the county funds was the treasurer, Allen gave back the check to Kohn in his capacity as deputy treasurer, asking only for a receipt, which was given in the following form:

"STATE OF ALABAMA, MONTGOMERY COUNTY,
OFFICE OF COUNTY TREASURER.

No. 507.

Received from the Board of Revenue of County one hundred and eleven thousand one hundred and nine 58-100 dollars, proceeds of sale $100,000 bonds.

JOHN J. COCHRAN, County Treasurer.
By JOHN P. KOHN, His Attorney."

(Record, 110.)

The bonds were then delivered to Kohn, as clerk of Josiah Morris & Co., who immediately sent them to New York and sold them. (Record, 110-111.)

The check was deposited on the same day with Josiah Morris & Co. as they were the county depositaries. (Record, 111.)

On the day that Josiah Morris & Co. gave their check for the bonds, they were insolvent, and their check was worthless, though this was not known by either the Board of Revenue or by the county treasurer. They publicly failed a few days later. (Record, 111-119.)

The case, therefore, may be stated in its simplest form as follows: *A banking firm, the depositary of the county funds, buys bonds from the county and pays for them by a check on itself. At the time of the purchase it is insolvent, though this is not known to the county authorities. The county authorities innocently receive the worthless check, turn it over to their treasurer, who is equally innocent, who deposits it with the banking firm as the county depositary. On the failure of the banking firm a few days afterwards the county sues the treasurer on his official bond for the alleged loss of the county funds caused by the failure of his bank.*

THE LAW OF ALABAMA WHICH WAS DENIED THE PETITIONERS.

(1.) The duty of the treasurer as to this special fund was fixed by the special Act of the Legislature of Alabama of December 12, 1900, which created the fund. By this Act, the *Board of Revenue* were to issue, negotiate and sell the bonds and collect the proceeds, and pay over the proceeds to the *Treasurer*. No duty was imposed upon the Treasurer until the proceeds of the bonds had been collected.

(2.) Did the *Board of Revenue* perform its duty under the Act? It did not. When a public officer in Alabama is authorized or required to collect money, he is not allowed to collect anything but money in its primary sense, *e. g.*, coin and paper money issued by the United States Government or a National Bank. In other words, money in the sense that when paid over to a Treasurer, it can be kept by him in his safe in its integral form without change. THIS IS THE DISTINCTIVE ALABAMA LAW. What did the Board of Revenue do? Instead of exacting money from Josiah Morris & Company, the purchasers of the bonds, it took their check

drawn on themselves; in other words, in legal contemplation, their promissory note. This was the act which caused all the loss, for Josiah Morris & Company were insolvent, and defrauded the *Board of Revenue*, and through it the County of Montgomery, by giving it their worthless note in payment for the bonds. It is true that in other jurisdictions money has a broader meaning. In commercial usage and in business transactions, it is often used in a large generic sense, as meaning any circulating medium, or instruments or tokens in general use in the commercial world as the representatives of value, such as certificates of deposit and checks. But all such instruments need to be collected or cashed before actual money is received. When the term is used in an Act of the Legislature, it becomes necessary to interpret the Act. An Alabama Act is to be construed with reference to the fixed and settled Alabama law as determined by the decisions of its Supreme Court.

By these decisions it is incontrovertible that public officers are to be paid in *actual* as distinguished from *representative* money.

West vs. Bull, 12 Ala. 340.
Alston vs. State, 92 Ala. 124.
State vs. Houston, 83 Ala. 361 : 78 Ala. 576.
Bibb vs. Snodgrass, 97 Ala. 459.
Powell vs. Henry, 27 Ala, 612.

We shall see as we proceed that the whole complaint is founded upon this distinctive Alabama law. The cause of action as stated by the plaintiff rested upon it.

(3.) What was the duty of the Treasurer under the Act? It is expressed in these words: "*The said county treasurer to be responsible for the safe keeping of all the proceeds accruing from the sale of said bonds which may come into his hands in his official capacity the same as other county funds, or money in his hands as such treasurer.*"

The treasurer as to this special fund is not dealing with third persons who might owe money to the County, and in respect of which it might be his duty to collect and pass judgment upon the kind of money tendered, but he is dealing with the *Board of Revenue*, which represents the County itself. The *Board of Revenue* is to collect. The Act assumes the money to have been collected, and properly collected by the Board of Revenue. The money is assumed to be in the possession of the County. All that remains is to turn it over to that officer who is the *custodian* of the county's funds. It is clear, therefore, from the very terms of the Act, that *as to this special fund*, the Treasurer had nothing to do with its collection. He was simply TO SAFELY KEEP what was turned over to him "THE SAME AS OTHER COUNTY FUNDS OR MONEY IN HIS HANDS AS SUCH TREASURER."

(4) What did this involve under the Alabama law? If the Board of Revenue had done its duty and collected *actual money* and paid it over to the treasurer, *safely keeping it* by the law of Alabama would mean, that he should keep it in the exact form in which he got it. He should put it in a safe, or make a special deposit of it in a safe deposit box, so that the identity of the very coin and bills should be preserved. It is in this respect that the *law of Alabama* differs from the law in other jurisdictions. As a corrolary from this, it is wrong for a treasurer in Alabama to made a general deposit of money in a bank, for this is construed to be an unlawful lending of the *actual money* of the county to the depositary bank and is not only wrong, but a crime. It is hard for us to realize in these days when nearly all financing is done by bank credits, that there is a State in which the law requires public officers to have actual money, which insists upon their holding it in its identity just as received, and which not only denies to them the convenience of bank deposits, but makes any general deposit in bank criminal, but such is undoubtedly the law of Alabama, and it is the ignoring of this law by the Circuit Court of Appeals

that we are complaining about. When a treasurer in Alabama does make a general deposit of *actual money* in a bank he and his bond may be sued for a conversion of it. Why? Because the treasurer had actual money, but now he has handed that actual money over to a bank and taken the bank's credit in the form of a deposit account.

Alston vs. State, 92 Ala. 124.

This is the gravamen of the complaint. The suit is based upon a conversion by making a general deposit. This is alleged to be the breach of the condition of the treasurer's bond in all the counts of the complaint except the sixth and eighth, which latter we will refer to presently. (See Record, 22 : 23 : 24 : 26 : 32.)

(5) But the *Board of Revenue* instead of collecting money, took the promissory note of Josiah Morris & Co. for the bonds, and turned over this note to the treasurer. This was not the proceeds of the bonds within the meaning of the Alabama law, as it was not money. Not being money, it was a thing which by its very nature could not be *safely kept* in its identical form by the treasurer. A demand note is not intended to be kept, but collected and turned into money, and in the very process of collection it must be surrendered to the promissor, and not kept. The duty of the treasurer as to this special fund never attached, because it could not attach until actual money came "*into his hands in his official capacity;*" money which he could *safely keep* in its identical form. Nor could there by any possibility be any conversion by a general deposit under the Alabama law, which is the wrong we are sued for, unless actual money was in the hands of the treasurer and by him deposited.

(6) This distinction is not a mere technicality, but lies at the very root of the whole question of liability, both in law and justice. We do not know of any State except the State of Alabama in which the making of a general deposit of

county funds by a county treasurer is a wrong or a crime, or in which the county treasurer is obliged to keep actual money in its identical form as received. Therefore, in most other States, a suit like this could not be brought. The entire justice of the application of the principle in this case is apparent. Why should the treasurer and his surety pay for the loss? The thing taken by the Board of Revenue in payment for the bonds was a worthless note. This was their fault, as they should have insisted on taking money. They took it innocently, as they did not know that Josiah Morris & Co. were insolvent. But this taking by them of a note instead of money is the real cause of all the loss to the county. Why should the treasurer be held liable for a loss brought about by the county itself, through its *Board of Revenue?* He had nothing to do with the sale of the bonds or the collection of the proceeds. His duty was simply to *safely keep* the proceeds as handed over to him. He had no idea that Josiah Morris & Co. were insolvent, nor was he under any obligation to see to it that the Board of Revenue, his superior officers, received actual money. Why should he pay over $100,000 to the county in exchange for a worthless note the county handed over to him?

How Petitioners Were Denied the Application of the Alabama Law to This Case.

Before calling attention to the specific manner in which the Circuit Court of Appeals ignored this special law of Alabama upon which this whole alleged liability rests, we desire to point out how the Court has misconceived the general relation of the parties. The Court deals with the question as if the treasurer were guilty of a grave wrong, bringing loss to the county, and trying to escape liability by reason of a technical defense. Precisely the contrary is the truth. When the Board of Revenue of Montgomery county issued the bonds, they sold them to Josiah Morris & Company. Josiah Morris & Company bought the bonds when they knew they were insolvent, and gave in payment a check drawn

by themselves on themselves; in other words, their promissory note. Here was the real fraud. Josiah Morris & Company swindled the Board of Revenue out of their bonds by giving a worthless note. The Treasurer was innocent of any wrong in this purchase, his only duty being to hold safely what was received by the Board of Revenue from this sale. It seems, therefore, a great hardship to make the sureties on the Treasurer's bond pay the proceeds of these bonds when the Treasurer never received anything in his possession that was worth anything. By the opinion of the Circuit Court of Appeals, the Treasurer, though innocent, is made to pay, through his bondsmen, for the fraud of Josiah Morris & Company, and that, too, when the thing which he received was turned over to him by the Board of Revenue, which, in this matter, by the express directions of the Legislature, represented the county of Montgomery itself. In effect, the Court says: "Although I took this check for the bonds and turned it over to you as my Treasurer, yet since it has now turned out to be worthless, I will make you pay its value." Evidently the sureties on the bond have a right to scan critically the principles of law by which such an unjust liability is sought to be imposed upon them.

1.

The Court ignored the law of Alabama in deciding that the check of Josiah Morris & Company, drawn by themselves on themselves, was funds, or money, within the meaning of the Act.

The opinion of the Court on this question is found in *Montgomery County vs. Cochran*, 121 Fed. Rep., pages 21-22. The Court decided that the statute must be construed in the light of commercial usage and common knowledge of business transactions. This would be entirely correct if it were the law of Alabama. This is an Alabama statute, which we are construing, and of course must be construed with reference to the fixed Alabama law as determined by the decisions of its Supreme Court. Whether checks and

certificates of deposit may be considered as money, or merely instrumentalities through which money may be secured, depends entirely upon the law and policy of the particular State whose statute is being construed.

In a State where a public treasurer is obliged to retain the public funds in specie without change, and where general deposits in banks by him are unlawful, then checks and certificates of deposit cannot be considered as money or public funds. In other States, where such general deposits are lawful, and where a treasurer is considered as having funds in hand whenever he has a bank balance, then they may be considered as money or public funds. Now the Court has held that a check or certificate of deposit is money or funds in the hands of a public officer in Alabama entirely ignoring the fixed law of Alabama that general deposits are unlawful, and that the treasurer must hold in specie that which he receives. The Court, to support its proposition, cites authorities from other States, an examination of which will show that in all of them checks and certificates of deposit were held to be money or public funds precisely because in those States general deposits are lawful, and precisely because a public officer can be properly said to have money in his hands when he simply has a bank balance.

2.

The Court, having erroneously applied the general law of other States to the construction of this Alabama statute immediately falls into a self-evident contradiction, we respectfully suggest.

The Court, in its opinion, says on page 21: "We think, therefore, that checks, or certificates of deposit received in good faith by the Board of Revenue and delivered to the treasurer, or delivered by the direction of the Board of Revenue to the treasurer, would be *funds or money* for the *proceeds of sale* of the bonds in the hands of the treasurer. But if this be so, was it not the duty of the treasurer to

keep the check? The plain and explicit language of the statute is—'and the proceeds of said bonds shall be paid over to and kept by the treasurer of the county.' * * * "Said County Treasurer to be responsible for the safe keeping of all the proceeds accruing from the sale of the bonds. If this Court decides the check to be funds or money, and proceeds of sale of the bonds, how is it possible to ignore the exact language of the statue that these proceeds shall be kept by the treasurer?" But the Court then goes on to say, page 22: "It was not his duty to keep the check but to have it cashed, and to keep the coin or notes received for the check * * * in his own safe, or on special deposit." This, we respectfully submit, is self-contradictory. If proceeds, or funds of money, under the statute, are coin or notes, as we contend, then we can understand why Cochran should keep the coin or notes. But, if the check is proceeds, or funds of money, then under the express terms of the statute, it should be kept by Cochran and moneys drawn on it only as directed from time to time by the Board of Revenue. The great injustice to the sureties in this case we respectfully urge is clearly shown by this construction of the statute. There would be no more difficulty in the treasurer keeping this paper in the form of a check, but in reality a promissory note, than in keeping a certificate of deposit or a bank deposit book containing an entry of deposit, its precise equivalent. Suppose he had kept it in his safe; the loss to the county would have been the same as it is now. The bank would have failed in the same way, and at the same time, as it really did. The deposit of the check and the taking of a bank credit would not change the situation. It would amount simply to taking one promise for another. So we have a case where if the check was funds or money, or proceeds of the sale of the bonds, the sureties are to be held liable for a loss, which precise loss would have occurred anyhow if the treasurer had done his entire duty by keeping the check.

3.

It will be remembered that the treasurer did not keep the check or note, but deposited it in bank, and took a bank credit therefor. The Court decided upon this act of the treasurer, page 22, as follows: "When the check was presented at the bank and accepted by crediting the amount to the treasurer, the effect in law of the transaction was the same as if the amount of the check had been handed to the treasurer and by him returned to the bank." This proposition is true in cases where it is applicable, but we respectfully urge it is not applicable in a case like the present, because—

(*a*) It ignores the special law of Alabama, to which the opinion makes no reference, that a general deposit of this amount is a felony, and that no civil rights can be created thereby.

Alabama Code, vol. 2, secs. 406-8.

As stated by Judge Jones in the Circuit Court: "The transaction, however, was not lawful. In view of the amount involved, it constituted a felony. The law requires the Court to ignore the transaction; to deny to it effect; to treat it as though it never happened, and decline to enforce any claim which must rest upon the validity of the transaction. If the Court should undertake, out of this unlawful transaction, to coin money and put it in Cochran's pocket as treasurer, in order to hold the sureties accountable as for a conversion, it would violate the law of the land as plainly as any private citizen who undertakes, without authority of law, to make money out of that which is not money. In both instances the money would be counterfeit. That would be invoking a fiction of the law to put burdens upon the sureties contrary to all rules of law for measuring their liabilities, and in defiance of the law of the land."

And again: "Most assuredly this result is an effort of the county to get the benefit of an illegal contract, and to enforce

it as legal in order to get money out of its agent or representative, who, in fact, received no money. The county relies on a fiction of law which cannot be raised, as it involves enforcing as good and binding that which the law declares odious and unlawful."

(*b*) It ignores the real question in dispute. The real question is whether Cochran converted public money by a general deposit. If the check is the thing that was converted, then there was no damage as the bank credit received therefor was of equal value. If the check was not the thing that was converted, but money, what money? There was no real money in Cochran's hands, and how could money get presumptively, or by fiction of law, in his hands for purposes of conversion by the very act relied on as a conversion? By what magic is money in the hands of Cochran for bank deposit? There must first be money in his hands, and then a conversion of it by general deposit. In other words, before he begins to make the deposit, there must be money which is about to be converted by a general deposit. We respectfully urge that authorities which decide that a check due by the drawer of a check to the payee is discharged by the deposit by the payee of the check in bank just as if money had been paid, can have no possible application to the present case, which depends—at least this branch of it—on the allegation of the conversion of the money by a general deposit.

(*c*) It ignores the insolvency of the bank. This is not a case where actual money or even a check on another bank, which is collectible, is deposited by a public officer in a bank which afterwards fails, where by all the authorities a public officer, and his sureties, are held liable; but it is a case where the thing deposited in bank is the bank's own note and where the bank was insolvent at the time the note was given. There is no authority anywhere which holds that the deposit of a bank's own check in the same bank is equivalent to a deposit of money if there is no

money in the bank at the time of the deposit to meet it. Suppose a bank to be utterly insolvent, not able to pay five cents on the dollar, could anyone contend that a deposit of its own note would be equivalent to money? The theory of such cases is that if the check had not been deposited it would have been paid on demand and the money deposited, but if there is no money there to pay the check with, then the fiction of law does not apply. In the particular case at bar the note was $111,109.58. There was only $35,000 in the bank on the date of its being given and on the date of its deposit. (Record, 112-113.) The bank publicly failed in about two weeks, and when its assets were all collected and distributed it paid only 25 cents on the dollar, and the county of Montgomery received on this note the sum of $26,000, which has been deducted from the claim sued for, so that the note, to the extent of the claim sued for, was utterly valueless.

(*d*) It would be, moreover, unjust to apply the fiction above referred to, as against the sureties on the bond.

The difference between the deposit of money and the deposit of a note, or check, which is not paid, has the greatest possible effect on the rights of the surety to the funds of the insolvent bank. Josiah Morris & Company knew in this case that county funds were being deposited, and that the deposit was contrary to the law. Under these circumstances, the deposit is a trust fund, which gives the sureties a preference over the general creditors of the bank.

Myers vs. Board of Education, 51 Kan. 87.
San Diego Co. vs. The Bank, 52 Fed. Rep. 59.
Davis vs. Elmira Savings Bank, 161 U. S. 289.
Frelinghuysen vs. Nugent, 36 Fed. Rep. 239.
Brown Co. vs. Latimer, 36 Fed. Rep. 62.

But this principle only applies when the assets of the bank have been actually augmented by a deposit.

Richardson vs. New Orleans Co., 43 C. C. A. 583.
Richardson vs. New Orleans Deb. Co., 42 C. C. A. 619.

Here the county is trying to hold the sureties upon the theory that actual money was converted by the treasurer by a general deposit, which was wrong to the knowledge of the bank. If this were the case, and the sureties were held liable, they would have a priority over all the general creditors of the bank, and could probably get their money back. The county then proves a case which shows that no actual money was deposited by the creditor, and that the bank's assets were not increased one cent by the deposit of the check or note, but seeks to supplement their proof by a fiction of law that the deposit shall be regarded as money. This might be just if the fiction worked in favor of the sureties as well as in the favor of the county.

But the contention is that the fiction shall be held just long enough to hold the sureties liable, and then dropped as soon as the sureties attempt to enforce their rights in indemnity against the county.

But the crowning injustice lies in the attempt of the county to saddle its own negligence upon the treasurer. The county, through its Board of Revenue, has lost this money by not performing its duty of collecting it, and this, of course, puts them in an inconsistent position. They are obliged to rely upon the one theory, to wit, the general deposit, in two contradictory aspects. In order to succeed, they must first rely on the general deposit being a conversion or crime, in order to have a cause of action, and at the same time to rely upon it as a valid contract in order to prove that the treasurer had money in his hands. In other words, the general deposit must be both wrong and right in order that this extraordinary cause of action may be maintained.

The case was decided against the defendants upon the ground that the check of Josiah Morris & Company was money; that Cochran converted it by making a general deposit, and that as matter of law it was worth its face value.

There were two other counts in the complaint upon which the Court of Appeals held that the case might have been decided in favor of the plaintiff.

Count 6 alleged that the bonds were delivered by the Court to Cochran by virtue of a false representation made by him that money had been actually received by the treasurer (Record, 29), and

Count 8 alleged that Cochran undertook to collect the proceeds of the bonds and wrongfully and knowingly failed to collect and receive the same. (Record, 34.) In its decision on both these counts the Court ignores the Alabama statute under which Cochran's duties do not begin until after he gets the proceeds of the bonds in his hands and then is limited to the duty of *safe keeping*. He has no duty of collecting the proceeds, and therefore any failure to get actual money in his hands from the Board of Revenue or any false statement made by him, even if he made any, would not come within the penalty of his bond or the obligation of his surety. Even if this were not so, it is entirely clear that the case presents no liability by way of estoppel under the sixth count.

The breach in this count is stated as follows:

"And the plaintiff avers that the condition of said bond has been broken in this—That the said John J. Cochran, as such treasurer, by and through his deputy Kohn, as aforesaid, did pretend and represent to said Allen, as clerk of the said board of revenue, that the said sum of $111,109.58, the purchase price of said bonds, had been paid to him, said treasurer, and by reason of such pretense and representation caused said Allen, acting for said board of revenue, to deliver said bonds to said Josiah Morris & Co., and to incur the obligation thereof as aforesaid, when in truth and in fact no part of said money had been paid to said treasurer and no part thereof has been paid to plaintiff."

We should first understand precisely what is meant by this alleged breach of the bond in the sixth count.

1. That Kohn did pretend and represent to Allen that the sum of $111,109.58, the purchase price of the bonds, had been paid to the treasurer.

2. That this representation was false, inasmuch as no part of said money was paid to the treasurer or the plaintiff.

3. And by virtue of this false pretense the treasurer, through Kohn, his agent, caused the delivery of bonds to the bank.

What is meant here by the pretense that the sum of $111,109.58 was paid to the treasurer? Does it mean that it was pretended that a check was given to the treasurer, or that he secured a bank credit by its deposit? It cannot mean this for two conclusive reasons: (a) Allen knew that a check had been given to the treasurer, for he gave it to Kohn, as agent for the treasurer, himself. And he also thought it had been deposited (Record, 116.) He was not deceived by either of these things because he knew them both; (b) but still more conclusively, the pretense charged in this count was a *false pretense* The charge is that he pretended and represented that the sum of $111,109.58 was received, whereas in truth and in fact it was not received. It is only by virtue of the falsity of the pretense that an estoppel is created at all. There can be no estoppel if the alleged pretense is in fact true. It would be a misnomer to call a true statement a pretense. Now by the uncontradicted evidence it was *true* that Cochran did receive a check, and did get a bank credit thereon. Therefore the statement that he pretended to have received $111,109.58 means something other than that he received this sum as a check or bank deposit. It must necessarily mean that he received this sum in *actual money*, for in this sense alone, under the facts, could it be regarded as a pretense or representation which was not true, and, therefore an estoppel, if, by virtue thereof, the bonds were parted with. The real question, therefore, is—did Allen part with the bonds in the belief that Cochran had collected actual money, and was that belief brought about by representation by Cochran or his agent Kohn?

The facts are few and undisputed, and are found on pages 109-117 of the Record, to which the Court is respectfully referred.

(*a*) Does this testimony tend to show that Allen was induced to part with the bonds under the belief created by any thing said or done at and about the time of the delivery of the bonds, that the check had been collected in actual money?

We affirm that it does not.

It must be shown not only that the representations made by Kohn, either by words or acts, were calculated to make Allen believe that the check had been collected in actual money, but that they did actually create such belief.

Now it positively and expressly appears from the testimony of Allen himself that he had no such belief. He expressly says he thought the bank was solvent, that the check was good, and he thought, when the receipt was given him and the bonds delivered on the faith of it, that the check had been deposited in bank. No one pretends that Cochran, through Kohn as his agent, represented the check to be good or the bank solvent; and such is not the alleged pretense relied upon in the complaint. Kohn did do acts as Cochran's agent from which Allen had the right to infer that Cochran deposited the check in bank. So that it can be said that Cochran represented to Allen that the check had been deposited in bank. But this representation was true, it was not a false pretense, and, therefore, could not be the foundation of an estoppel. Nowhere does Allen say, on reasonable or unreasonable grounds, that he thought Cochran had collected actual money on the check, nor that Cochran so represented; and this is the only belief, and the only representation which, as we have seen, could have been the foundation of an estoppel. On the contrary, so far was Allen from being effectively induced to part with the bonds upon any representation that actual money had been collected on the check, that he was not induced to part with the bonds even by the implied representation that the check had been deposited, for he expressly says *that if Kohn had brought the receipt at the same time as he brought the check he would have*

given him the bonds. What does this mean? It means, and this is conclusive on this branch of the case, that all that Allen wanted was a voucher in his office to represent the bonds delivered, as required by the law of Alabama in reference to county expenditures; for since he would have given the bonds if the receipt and check had been brought together, and since if the check and the receipt had been brought together and passed over for the bonds, the check could not at that time have been either deposited or collected, it follows as a necessary and absolute conclusion, that the giving of the bonds, in Allen's mind, was not dependent upon either the deposit or the cashing of the check.

If, therefore, Allen was not, as a matter of fact, induced to deliver the bonds by any false representation that the check had been collected in actual money, how does it become material to discuss the acts and words of Kohn from which such a representation might possibly be inferred?

Even if we should admit *ex argumenti gratia*, that such a representation might, by possibility, be inferred from the acts and words of Kohn, the complete answer is that it had no effect on Allen and was not in any way the inducing cause for the delivery of the bonds.

The plaintiff claimed that the evidence showed an estoppel as matter of law.

The only thing it can rely on is the receipt. They argue that the receipt was conclusive as matter of law on the point that Cochran had received actual money.

Now we all known that bills are paid every day by check and the receipt given says: Received—so many dollars. A receipt may therefore mean received actual money or money in its generic sense, such as a check. Again, the receipt in this case read—received from *the Board of Revenue*—and Allen knew that the only thing received from the *Board of Revenue* was a check. Again—the receipt stated—"received * * * $111,109.58, proceeds sale $100,000 bonds,"

and this Court has expressly held that the check was "the proceeds of the sale" of the bonds. So in this case it is evident, in the contemplatien of both parties, the receipt meant that a check was received, and not actual money. Allen did not take the check and keep it, for he was not entitled to hold it. The treasurer was the proper custodian of the check, and that was the only reason Allen handed it back. Since he could not hold the check, and since he needed a receipt as a voucher for the delivery of the bonds he asked for a receipt, and for no other reason. Kohn would have given it to him then and there, or have written one on the spot, but for the fact that the receipts of the treasurer are numbered and kept in a blank book, and he had to go back to the bank, where he kept his office as attorney in fact for the treasurer and get the blank form of receipt from the book. As soon as he got it and filled it out he returned with it to Allen, and received the bonds upon delivering the receipt. When you add to this simple statement of the facts, the further fact that Allen did not believe, as matter of fact, that the money had been actually collected, it is idle to argue that the receipt constituted an estoppel as matter of law, and particularly an estoppel such as is claimed in the sixth count of the complaint.

B.

The Circuit Court of Appeals, with great respect, has involved itself in ignoring the special Alabama law in contradictions which are evident on the face of its opinions.

We know that the Supreme Court does not, as a rule, review a case upon *certiorari* merely upon a showing that the Circuit Court of Appeals is wrong on the merits. But here is a case, we respectfully urge, where the opinions filed by the Circuit Court of Appeals contain such inherent contradictions upon their face that it is evident that they should not stand.

1. The Court holds that the check of Josiah Morris & Co. is "funds or money" or "the proceeds of the sale" of the the bonds in the hands of the treasurer. If this is so, then by the express terms of the Act it would be the duty of Cochran to *safely keep it.* But the Court holds that though it is "funds or money" in his hands, it is not his duty to keep it, but to have it cashed and keep the cash or notes in conformity with the law of the State.

2. The Court holds that the check was "funds or money" or "the proceeds of sale" in the hands of the treasurer. If so, Cochran committed no wrong in receiving it. The giving of the receipt made no difference. A check does not *ipso facto* become money by the giving of a receipt, except upon the principle of estoppel which we have already discussed, and his sole duty, according to the opinion of the Court, was to collect it and turn it into cash. Now, although the Court holds his sole duty to have been to collect the check, yet it would not allow the defendant to prove the check to have been uncollectible even with the exercise of the utmost diligence.

3. The Court holds that the check is not money in the primary sense, but an instrument on which money was to be collected; but yet it holds as matter of law that the check is to be treated as worth its face value, entirely irrespective of the solvency of Josiah Morris & Company.

4. The Court in *Montgomery Co. vs. Cochran*, 126 Fed. Rep. page 460, states the effect of defendant's contention concerning the insolvency of the bank, as follows:

"The contention of the defendant in error is, in effect, that if the treasurer selects an insolvent bank from which could be collected only 25 cents on the dollar, in which to make the deposit, and the whole fund is lost, he is liable for only one fourth of it; and, of course, applying the same principle, if the bank selected for the deposit is utterly worthless, the treasurer and the surety on his bond would incur no liability at all."

Now this is not at all the defendant's contention, and is entirely at variance even with the statement by the Court of defendant's position in 121 Fed. Rep. 22.

The defendants have never contended that if they deposited money in a bank which turned out to be insolvent, they would not be liable. Such liability has been settled everywhere. We are dealing here with the value of the thing which was deposited, which was not money, but a promissory note; not only a promissory note, but the note of the very bank in which the deposit was made. It is with respect to the value of this thing at the time it was received by the treasurer and deposited by him, that the insolvency of the maker of the note is pertinent. The Circuit Court of Appeals held that this note was "the proceeds of the bonds" and properly received by Cochran, and his duty was to collect it; but with all that, would not allow us to show that it was uncollectible. This is so different from the case of actual money, or a collectible check being deposited in a bank which afterwards turns out to be insolvent, that we must be permitted to express great surprise that the Court should have so completely misapprehended and misstated defendants' position.

5. The Court also holds that there was a conversion by general deposit, although conceding there was no money to convert until after the deposit had been made, which by fiction of law is supposed to have created the money.

C.

The Question of Practice.

When the case was tried the second time, the points involved were set out by the defendants in a series of demurrers and special pleas. (Record, 47-53.)

After the decree of the Circuit Court of Appeals, when the case was remanded, defendants asked for a repleader, which was denied. The defendants then asked for leave to file the same demurrers and the same pleas which they had filed in the former trial. This application was also denied. (Record, 104-5.)

The defendants were, therefore, obliged to file demurrers and pleas of a different character from those already filed. (Record, 66-87.)

The reason given for not permitting the same demurrers and pleas to be filed was, that they had already been passed upon by the Circuit Court of Appeals. The defendants did not desire these same demurrers and pleas to be filed for the purpose of arguing them, but simply for the purpose of having them passed upon formally, so that in the event of a writ of error from the Supreme Court of the United States, that Court could pass upon the same questions exactly as decided by the Circuit Court of Appeals.

We respectfully urge that although the demurrers to our pleas filed in the second trial were sustained by the Circuit Court of Appeals, yet in a case where the defendants claim that a writ of error lies from the Supreme Court, and when a third trial is necessary, only to have a final judgment in the Circuit Court of Appeals, and not an interlocutory one, we are entitled to have such final judgment on the pleadings just as they were when the Circuit Court of Appeals, ruled on them and remanded the case for the third trial.

Wherefore, your petitioners pray that this Court issue a writ of *certiorari* to the United States Circuit Court of Appeals, for the Fifth Judicial Circuit, directing it to certify to this Court the record of its proceedings in said case.

JOHN J. COCHRAN,
FIDELITY AND DEPOSIT COMPANY
OF MARYLAND.

EDGAR H. GANS,
THOMAS A. WHELAN,
Counsel for Petitioners.

WE HEREBY CERTIFY That we have examined the aforegoing petition for the writ of *certiorari*, and that, in our opinion, the petition is well founded, and the case is one in which the prayer of the petitioner should be granted by this Court.

EDGAR H. GANS,
THOMAS A. WHELAN,
Counsel for Petitioners.

NOTICE. The notice of the application and the aforegoing petition was served on the counsel for the county of Montgomery on October 10, 1904, and their written admission of service is on file in the clerk's office of the Supreme Court of the United States.

EDGAR H. GANS,
THOMAS A. WHELAN,
Counsel for Petitioners.

In the Supreme Court of the United States.
October Term, A. D. 1904.
John J. Cochran and Fidelity and Deposit Company of Maryland, Petitioners.
vs.
County of Montgomery, Respondent.

Motion for Writ of Certiorari.

Come now the petitioners above named, by Edgar H. Gans and Thomas A. Whelan, their counsel, and upon a certified copy of the transcript of the record in the case of John J. Cochran and the Fidelity and Deposit Company of Maryland vs. the county of Montgomery, in the United States Circuit Court of Appeals for the Fifth Circuit, and a certified copy of the opinion rendered thereon by said Court of Appeals and upon the annexed petition, moves this Court for the issuance of said writ of *certiorari*, directed to the Circuit Court of Appeals, to bring before this Honorable Court the case entitled John J. Cochran and the

Fidelity and Deposit Company of Maryland, recently decided by said Court of Appeals, for such proceedings therein as to this Court may seem just, and for such other relief as in the opinion of the Court may be just, and that the copy of the record filed under the writ of error may be directed to be taken and deemed a sufficient return to the *certiorari*.

Dated at Baltimore, Maryland, this 10th day of October, 1904.

EDGAR H. GANS,
THOMAS A. WHELAN,
Counsel for Petitioners.

APPENDIX.

Local Law of Alabama, as stated by Judge Jones.

The following is the opinion of Judge Jones, in deciding the case in the Circuit Court, in which he fully stated the Local Law of Alabama:

OPINION OF THE COURT.

In the Circuit Court of the United States for the Middle District of Alabama.

The County of Montgomery

vs.

John J. Cochran and The Fidelity and Deposit Company of Maryland.

JONES, District Judge:

In passing upon the demurrer to the pleas, it is important to bear in mind the precise nature of this suit. It is an action by the County of Montgomery against its treasurer and the sureties upon his official bond. It is needless to state the allegations of the several counts at any length. It suffices to say that they all count upon breaches of the official bond of the treasurer, for not safely keeping, etc., money which Cochran received as treasurer. It is alleged that he converted money received by him, either by making a general deposit or an individual deposit, or allowing his agent to make a general deposit in a private bank, and permitting the bank to convert the money to its own use. It is unnecessary to notice all the defenses set up by the pleas, which are numerous. One of the defenses is that no money was paid to Cochran or received by him in payment of the price of certain bonds sold by the county, the proceeds of which it is alleged that Cochran received. Another defense is that

the bonds were awarded by the Board of Revenue, plaintiff's agent, to Josiah Morris & Company for the sum of $111,-109.58, to be paid in cash upon the delivery of the bonds, that Kohn was an employe of the bank, and at the same time Cochran's deputy, and that Kohn, knowing that the bank was insolvent, delivered in payment of the price of the bonds a check of Josiah Morris & Company on themselves, payable to Cochran, as treasurer, for that amount, and handed the check to the clerk of the Board of Revenue, who refused to receive it; and that shortly afterwards Kohn, acting under a power of attorney, which authorized him to do all acts which Cochran could lawfully do, gave a receipt to the Board of Revenue in Cochran's name as for so much money received by Cochran from the Board of Revenue.

It is further alleged that no money ever actually passed, but that the check of Josiah Morris & Company, drawn on themselves, payable to Cochran, as treasurer, was surrendered to the bank, which was insolvent, received the check and entered a credit for a corresponding amount in favor of Cochran on the books of the bank, and shortly afterwards the bank failed, etc.

"The demurrers to these pleas present the important question of law, whether the facts stated by the pleas present any defense; or, to state it in another form, insist that under the facts stated in the pleas, there was a receipt of money by the treasurer, and a conversion of money by him in the eye of the law, which breached the obligation of the bond to safely keep monies of the county received by him.

"The condition of the bond is that the said treasurer 'shall faithfully discharge the duties of his office during the term he continues therein, or discharges any of the duties thereof.' We are bound, therefore, to look to the law to see what the treasurer's duties were in relation to the receipt and safe-keeping of the sums of money alleged to have been received by him—particularly the road and bridge fund. His duty regarding that fund is fixed by an Act authorizing the issue

of the bonds, approved December 13, 1900. That Act authorizes the Board of Revenue 'to negotiate and sell the bonds for not less than par, and provides' * * * 'and the proceeds of said bonds shall be paid over to and kept by the treasurer of said county, to be applied to roads and bridges; such use, payment and application of the proceeds to be under the direction and by authority of said Board of Revenue of said county of Montgomery, and said county treasurer to be responsible for the safe keeping of all of the proceeds accruing from the sale of said bonds which may come into his hands in his official capacity, the same as for all other county funds or money in the hands of such treasurer." In a prior section the Board of Revenue were "authorized to do any and all acts necessary to carry out the provisions hereby granted," either through themselves or by agents, which were to negotiate and sell the bonds and collect the proceeds. It seems clear from these provisions that the duty of receiving the proceeds was intended to be put upon the board, by this special act, and to make the responsibility of the treasurer's surety begin only when the "proceeds" were "paid over to the treasurer."

Section 1429 of the Code makes it the duty of the county treasurer "to receive and keep the money of the county, and disburse the same according to law." The other sections of the Code relative to his other duties have no bearing upon the issues raised here. It will be seen at once, both as to the general and special fund, that the responsibility of the county treasurer as to the safe keeping of money cannot exist, unless he has received money either in law or in fact, and that as to the special fund, he has no official responsibility until the proceeds, money, was paid over to him. The Board of Revenue was under the duty to collect the price of these bonds, and the payment and application of the proceeds, by the express terms of the act, was to be under the direction of the board. The county treasurer is not under any responsibility as to the safe keeping of the proceeds of the bonds until they came into his hands as money. The

marked difference between the power to collect and the duty "to receive and keep the money of the county," is sharply illustrated by the respective duties of the treasurer and the Board of Revenue, especially as to this particular fund, the alleged conversion of which constitutes the bulk of the claim against the treasurer. Cochran had no duties whatever with reference to the bonds, their sale or the collection of the proceeds from the purchaser, and these proceeds could lawfully be nothing but money—money to be turned over to him. Until the "proceeds," money, came into the treasurer's hands, there was no liability imposed upon his sureties, and then only for its safe keeping and lawful disbursement. If the person whose duty it is to make the payment does not tender it or make an illegal tender, there is no duty on the treasurer to receive; for in such a case the law plainly gives no power and imposes no duty on the treasurer to receive anything or demand anything, certainly not as to the special funds, unless the board tendered it. The defendants are not being sued here because Cochran did not collect the check; on the contrary, the suit is based on the ground that he collected it, and converted the proceeds.

"Unless there is something outside of the duties enjoined on the treasurer by the Code, or the act in question, which would make the sureties liable, it is quite clear that the contract covered by the bond does not make the parties to it responsible for anything but money which came into the hands of the treasurer, and as to which money after receipt by him, he is in some way in default for not safely keeping. To make out the case stated, it is clear that the plaintiff must prove either that Cochran actually received money which he failed to keep safely, or that in the eye of the law, he did something with the check which the law treats as the receipt or collection of 'money' by him as treasurer.

On the demurrers to the pleas, it is true that no money was actually received by Cochran or used in the transaction, and the liability must be determined by the receipt of the

check of Morris & Company, payable to Cochran, its surrender to that bank, and the taking of credit therefor as county treasurer as on general deposit. If the law treats this transaction, though no money was actually received, as a payment of the check, and the receipt of money by Cochran, and the deposit of that money in bank on general deposit as treasurer, then Cochran and his sureties are liable; otherwise, they are not liable. The general, and I think I may say, the universal rule of law, is that when the owner of a check surrenders it to a bank on which it is drawn, and has the amount passed to his credit, that it operates a payment of the check and discharges the drawer and pays the debt for which the check is given. The owner of the check is treated as having collected money from the drawer and paid it into the bank, and the bank is treated as having received so much money from the holder of the check, who, in turn, is treated as having deposited so much money in the bank to his credit. The fact that no money was actually received, that the drawer had no money in the bank, or, for that matter, that the bank giving credit had no money with which to pay the amount, will not in any wise, save the exceptional cases of fraud and the like, change the legal effect which the law ascribes to the transaction, as a payment, collection and deposit of money. Why is this? Because that result is inevitable from what the the parties to the transaction intended and did.

It completely carries out what they wished to do; to put money in the hands of the owner of the check; to allow him to put that money into the bank again if he so desired. Such transactions are common and result from the necessities of modern methods of transacting commercial business. I do not question that this is the true rule everywhere, even as to public funds, where the law permits the taking of checks by its officer, and the placing of public funds on general deposit in bank. If a like result follows here under the facts, on what principle is it worked out? How is the transaction to

be treated, as a receipt, collection of "money of the County of Montgomery" by its treasurer, under the peculiar provisions of our statutes, forbidding the transactions relied on?

"The pleas show that no money was actually received, and if the transaction can amount to a receipt and deposit of money by the treasurer, it must be because that was the intention of the parties to the contract made by the transaction, coupled with the further indispensable element, that the transaction be such, that the law would permit the contract to be made, and recognizes and enforces the rights growing out of it. If the transaction was forbidden by law and denounced under a penalty, how can it be said to be a receipt of money by the treasurer, or a deposit of money by the treasurer, when no money was in fact used, when the law will not permit the making of the contract or enforce it or any right dependent on it?

"The law said to the treasurer, you have no authority to take a check instead of money. You are forbidden to receive checks in payment of debts due the county. It also said to the treasurer and the bank both: If the tax collector has money, and he deposits it with you on general deposit, and you use the money in any way, you and he are guilty of an unlawful transaction, which, involving the amount here concerned, is a felony. It is an inexorable rule of law, that it will not recognize or enforce directly or indirectly any right based on such a transaction.

Certainly, when Cochran got the check, which is not money, and which he was not authorized to receive, he did not receive any money or collect any money. At what moment of time was the check received converted into money, and how? Certainly, as long as he held the check, it cannot be said that he received any money, and if he never received anything for the check except a credit on the books of the bank which drew the check, that was certainly not the receipt of money, when the bank had no right to give the credit, and the treasurer had no right to take such credit for any prop-

erty of the county, surrendered to the bank. No money having been actually paid on the check, I repeat, how and by what means was it converted into money? Most certainly, only by the effect accorded to the contract made by the surrender of the check and the taking of a credit therefor on the books of the bank. If this transaction had never happened, and Cochran still retained the check, counsel for plaintiff would not contend that Cochran received money when he received the check, or exchanged it for a credit; and yet the law says that this transaction never happened, for it must be treated as a nullity, conferring no right upon anybody growing out of it. How is the receipt and collection of money in the eye of the law to be worked out, except by imparting legal effect and validity to a transaction which the law denounces, and which it says shall have no effect and validity? The whole case of the plaintiff turns upon the theory that Cochran received money by the transaction, which he converted, and this in turn hinges upon giving validity and force to the rights growing out of the transaction, which the law repudiates and condemns. Without that transaction, there is assuredly no semblance of foundation for claiming that Cochran received "money of the county" which he failed to safely keep. It matters not what the parties intended by the transaction; for the law says their intent shall not prevail, and that no right shall spring out of that intent or any act done under it. To treat the transaction as a receipt, collection or conversion of money by Cochran, is to enforce a contract attempted to be made in violation of the law for the benefit of the county. It is needless to cite authorities on this point. They are unbroken, in every English speaking country at least, that where a contract is intended to accomplish something which the law punishes as a crime the Courts are forbidden to recognize the contract or any rights dependent on it, or to enforce it directly or indirectly. The Board of Revenue is a tribunal of limited authority. It could not ratify the transaction. No power short of the legislature could do this, and unless there is such ratification, the

Courts must treat the contract as though it had never been made.

If Cochran had, in fact, received county money and deposited it in bank, of course the county could recover it. It would not rely on the contract of deposit, which was a conversion, but would have the right to repudiate that, and could recover the money because the collector had no right to deposit the county money in that way, and had converted it. That is not this case. The county does not seek to repudiate this transaction, but it insists that it be enforced in its favor, so as to create the receipt, payment or conversion of money, in the eye of the law, in order that Cochran can be said to have received money for failure to safely keep which he and his sureties are liable. While the law may not be generous in such matters, it sternly exacts the sureties' rights and never binds them by fiction contrary to law itself. It makes not a particle of difference that the county was not a party to the contract attempted to be enforced by the illegal transaction. It cannot avail itself of it any way, directly or indirectly. Most assuredly this result is an effort of the county to get the benefit of an illegal contract and to enforce it as legal, in order to get money out of its agent or representative, who in fact received no money. The county relies on a fiction of law, which cannot be raised, as it envolves enforcing as good and binding that which the law declares odious and unlawful.

I am aware that many men of the highest integrity and undoubted honesty constantly violate the law of the land, by making general deposits of public funds in bank, notwithstanding the law punishes it as a crime. They excuse it on the idea of an imperious necessity in our modern commercial transactions, which makes it almost impossible for disbursers of public funds to keep and pay out their money without the aid of banks. But, however this may be, and whatever opinion business communities may have of the wrong of such acts, the Courts, which are servants, not

makers of the law, cannot, without betraying their high trust, recognize or give effect to transactions which the law denounces as a crime, because many conscientious men do not so regard it.

I have carefully examined all the authorities cited on this question, and cannot lengthen this opinion by a review of them in detail. It suffices to say that none of the cases cited from the Supreme Court of the United States or elsewhere present the case where the obligee suing on the official bond of the disburser of public funds, seeks to enforce an illegal and void contract in order to create money in the hands of an official for which to hold his sureties responsible.

The case of the State vs. Alston, 92 Ala. 124, is in no wise an adverse authority. Alston was probate judge, whose duty it was to collect money due for licenses, which were put into his hands, which he had no authority to issue except on the payment of the sum fixed by law whenever he issued a license without taking money, he became liable for the amount thereof to the State, whether he received any money or not. The law implied the promise to pay and thereby created a debt as for money received whenever he parted with a license. He was sued on his official bond for not paying over to the State treasurer the money for a license. He set up as a defense that he took payment in a check, and deposited it to his official credit in a bank of good repute, which afterwards failed. The Court, in its opinion, in substance, said that such use being unauthorized, was equivalent to a conversion, and that treating the check as money, he could not defeat his liability by showing that he had converted it by the unauthorized deposit of it. The question here presented was not raised. The Court said nothing about it. If it had been raised, the Court could have decided it against Alston on the ground that his official bond was liable for the price of the license, whether a check was taken for it or not, and whether the check was paid or not. It was the license which created the liability.

The right of the State in no wise depended upon any contract which may have been made with the bank by the deposit of the check. No illegal contract was involved. He was made to pay a debt contracted by issuing a license. The Court plainly did not intend to assert a doctrine contrary to that proclaimed in the leading case of Vandyke vs. The State, 24 Ala. 81, nor the principles considered in the case of the State vs. Wolfe, 79 Ala. 206, or to overrule in any way the consistent line of decisions from its earliest days, and repeated whenever occasion required, that no rights could grow out of contracts offensive to public policy. In Wolfe's case the tax collector deposited tax money in the Merchants & Planters Bank here to the credit of Vincent as State treasurer. Vincent drew out $20,000 of this money, which he paid to the bank for New York exchange, which was payable to Vincent's order as treasurer. In paying interest on the public debt, such transaction was not unlawful. Vincent took the draft and transferred it to Wolfe, who collected the money and applied it to the payment of a private debt of Vincent's to Wolfe. The legal questions here confronting the plaintiff were presented in that case and urged to prevent a recovery. The Court admitted the law to be as stated, but said that the suit against Wolfe did not come within its influence. Why? The Court conceded that there was no authority to place tax money in the bank to the credit of the treasurer, and that he was under no obligation to collect it or receive it from the bank. It said Vincent checked the money out. It asked: "What was its status after Vincent obtained control of it by checking it out of the bank? Had it not then reached its proper depository and destination, and was it not then the money of the State in the hands of the proper custodian," the State treasurer? Further on, the Court said: "It was not the case of an alleged change of the character of the thing claimed and a conversion of it into money or some other chattel." Here it is claimed that a check was changed into money. In such a case, "there must be a ratification of

the unauthorized sale before the substituted money or article can be claimed, and claiming the money validates the sale and vests in the purchaser title to the property converted. This requires ratification, but it can only be done by competent authority. In this case there has not been any change of the character of the thing claimed, it was money at the beginning, and it is still money." It will be noticed in that case that Vincent actually received the money of the state, by taking it away from the illegal depository into his own keeping and then converted it into a draft, and a party who took this draft with knowledge, was treated as a stranger who aided in the misapplication of trust funds, knowing them to be such, constituting himself a trustee in invitum, laying himself liable to an action as for so much money had and received. Here, no money has been received. It is the check which is sought to be changed into money, and that change is sought to be effected by treating the contract as valid, which the law denounces as void, in order to put money in the hands of the treasurer, which he never in fact received, and this by enforcing for the benefit of the county that which the law avoids and condemns.

Remarks to the Jury on Directing the Verdict.

"Gentlemen of the jury, this is an important case, involves a large amount, and has attracted widespread interest. However much such considerations may exact care and deliberation on the part of the Court, they can exercise no legitimate influence in determining the principles of law which must control the case. They do not add at all to your cares, since the responsibility for the right application of the law rests solely upon the judge.

"There is no disputed question of fact in this case at the close of the evidence. During the trial the Court allowed declarations and reports of Cochran acknowledging amounts of money in the county treasury to go in evidence because the jury might infer from them the actual receipt of money by Cochran as treasurer, beyond the amount of actual money

for which he acknowledges responsibility. All the witnesses on either side who have any knowledge of the matter, have testified unequivocally that Cochran received no money on account of the bonds sold, and have stated facts which show that in the eye of the law that he never received any money the proceeds of the bonds sold. Cochran himself testifies that when these reports were made and admitted by him he stated to the official to whom they were made that they only represented 'paper transactions.'

"Under the rules governing the administration of justice in the Courts of the United States, where the evidence so strongly proves or disproves a fact, that though there be some slight proof the other way, the judge would be bound to set aside a verdict the other way, because not supported by the evidence—he is not bound to submit the question to the jury, but may treat the fact, as proved or disproved as the case may be, and direct the jury accordingly.

Hence in diposing of this case, the Court must hold that it has not been proved that Cochran received a cent of the proceeds of the bond sale. What he actually received of the other funds the time of this conversion and the amount has all been agreed. All the questions in the case are now matters of pure law. That you may fully understand that in giving you the peremptory instructions which I will give, the Court has not in any wise invaded your province as triers of the facts. I state the rules of law upon which the Court acts.

"This is a suit for the breach of a contract of suretyship. Neither in morals nor in law can a man be held to answer for the act of another unless he agrees so to be bound, or occupies such relations to that other that the law declares and deduces from that relation responsibility for the acts and doings of that other. How far the sureties are bound on the contract here, depends purely upon the legal effect of their contract. The law inexorably exacts that before the surety is compelled to answer for the principal's default it must

clearly appear that the duty breached is one which the surety promised the principal would perform. Fair doubts are resolved in favor of the surety.

"What was the responsibility of the treasurer as to this 'Road and Bridge fund?' The act says 'the said county treasurer to be responsible for the safe keeping of all the proceeds accruing from the sale of said bonds, which may come into his hands in his official capacity, the same as for other county funds or money in his hands as such treasurer.' It will be noted that the act does not say as to this special fund the treasurer shall be bound in the same way in all respects as he is under the general law as to the funds of the county. It is for the 'safe-keeping' only, and as to that alone that the responsibility of safe-keeping, 'the same as for other county funds' is applied. Four things must co-exist to raise this duty of safe-keeping under this act: first, there must be money to be safely kept; second, the things kept must be 'the proceeds of the bonds'; third, those proceeds must come into his hands'; fourth, they must come into his hands 'in his official capacity.' It is only when all these conditions co-exist, and not until then that the treasurer is to become responsible for 'the safe-keeping' of said money, as 'for other county funds in his hands as county treasurer.' The law places only one responsibility upon the treasurer as to these proceeds, and that is for their safe keeping, after they come 'into his hands as treasurer.' The law contemplated that the Board of Revenue would negotiate, sell and issue these bonds, and collect the price, which could only be taken in lawful money. This price, when collected in money, would be the proceeds of the bonds in the meaning of the law, nothing else would. They could not be taken in any other shape, for the Board was required by inevitable implication from the language of the act to sell for cash. It could not barter or exchange the bonds for anything else. This cash was unquestionably required 'to be paid over' after its receipt by the Board of Revenue, to the

treasurer of the county. The law put no duty on the treasurer to see to the collection of the proceeds. His duty in that regard, could arise only as to money, 'proceeds,' and then only after the proceeds came into his official hands, from the Board of Revenue. If he attempted to collect the proceeds or attempted to receive the proceeds, most assuredly, when those 'proceeds' were not money, he would not be engaged in the performance of any duty put upon him by the law. There were no conceivable circumstances under which he could be under any duty or have any authority to receive the check for the price of the bonds or was bound to receive or attempt to collect the 'proceeds' from anybody but the Board of Revenue. Under such circumstances the taking of the check from anybody, especially from a party who knew his authority, and particularly without any demand on his part of the person tendering the check could not bring him within the condition of the bond, under which the law fixes the responsibility for acts done 'virtute officii,' or under color of office. So the sureties could not be bound in law for any misfeasance or nonfeasance of Cochran as county treasurer, in not collecting the check or in receiving the check or in giving a receipt to the Board of Revenue as for money received from the board, when the Board of Revenue knew that it had not given him any money, and had none to give him; especially when it was advised by the check being tendered to its representative, that it had been attempted to pay the price of the bonds to Cochran by a check in his favor on the bank. It is immaterial, therefore, certainly so far as the liability of the sureties is concerned, what Kohn did or said about the check, or the disposition Cochran or Kohn made of the check so long as it did not result in placing the amount of the money, 'proceeds of the bonds,' in the hands of Cochran as treasurer. For this reason, the Court ruled out the questions as to the condition of the bank at the time of drawing the check, and giving the credit or what was done with the bonds, etc. Although Cochran had no duty to collect and, therefore, his sureties could not be bound for

wrongs and breaches in receiving the check, or not collecting the money, or exchanging it for a credit in bank, yet, if he in fact got actual money of the county in that way, or 'money' which in the eye of the law went into the hands of the treasurer and represented the proceeds of these bonds, he would be liable in this action, not because he undertook to do something which was not incumbent upon him, and did not improperly, but because he actually got money—which came into his hands—which was the property of the county, and received it as treasurer. Money gotten in this way it would have been his duty to 'safely keep,' and the placing of it on general deposit afterwards would have been a breach of duty, which would have made his sureties liable. It is not pretended that he got actual money on these bonds from anybody. On the contrary, it is admitted that he did not get any actual money; but it is claimed that by taking the check payable to him as treasurer, drawn by Josiah Morris & Company on themselves, and surrendering that check to the bank, and receiving a corresponding credit for the amount on its books, it amounted in the eye of the law to the money of the county, the 'proceeds' of these bonds, which came 'into his hands' as treasurer, and, therefore, his sureties are liable for converting this money, by placing it on general deposit, which was equivalent to a loan to the bank. If the transaction had been lawful, this result would follow, and the Court would have treated Cochran as having received and converted that much money as treasurer, and held his sureties responsible accordingly. The transaction, however, was not lawful. In view of the amount involved, it constituted a felony. The law requires the Court to ignore the transaction, to deny to it effect, to treat is [it] as though it had never happened, and decline to enforce any claim which must rest on the validity of the transaction. If the Court should undertake, out of this unlawful transaction, to coin money and put it in Cochran's pocket as treasurer, in order to hold the sureties accountable as for a conversion, it would violate the law of the land as plainly as any private citizen who undertakes,

without authority of law, to make money out of that which is not money. In both instances, the money would be counterfeit. That would be invoking a fiction of the law to put burdens upon the sureties, contrary to all rules of law for measuring their liabilities, and in defiance of the law of the land. There was nothing, then, in the transaction about the check, under the evidence, upon which to base any liability whatever of the sureties as to this road and bridge fund, bond proceedings.

"Again, Josiah Morris & Company purchased the bonds from the Board of Revenue, and it was the duty of the Board of Revenue to collect the proceeds from Morris & Company. It was not the treasurer's duty to do so. The Board of Revenue knew that Kohn represented the bank, and not Cochran, in the discharge of the affirmative duty of paying the price of the bonds, upon which payment alone there could be a legal delivery of the bonds, and that this could be done only after the payment in cash. If, under the circumstances, the board trusted Kohn to see to the payment of the price in cash, he was the agent of the board for that purpose, and not of Cochran, though he held Cochran's power of attorney; for the law upon the facts stated, determines in what capacity Kohn acted at the time. If, therefore, in a proper case Cochran's sureties could be made liable for failure to collect the check, that result cannot arise here. If there was negligence in the collection of the check, it was the negligence of the agent of the board, and not the negligence of the agent of the county treasurer. The county cannot plead negligence of its agent in the performance of a duty incumbent on it, in order to put responsibility on the treasurer's sureties for a misfeasance or nonfeasance of the treasurer, as to the collection of this check, as to which the law put no duty upon him. As between the county and the sureties, the case falls within the principle that where one of two innocent parties must suffer, he who is most at fault must bear the loss. As the

sureties are not at fault as to this matter, the loss cannot be put upon them.

"The doctrine of estoppel which has been pressed by the counsel of the county, cannot arise in this case for two reasons: First, the sureties did not agree to be bound by the acts or representations of Cochran as to this fund, until after he had legally received into his possession the proceeds of the sale of the bonds in cash. Second, if the estoppel could arise on the ground that the bonds had been delivered in reliance upon the representation that the treasurer had received the price of them in cash, the evidence in the case shows that the essential elements to the creation of the estoppel are lacking. Allen was the agent of the board in the matter of the delivery of these bonds, it was his duty to collect the price. Although he received a receipt from the treasurer, acknowledging that the treasurer had received from the Board of Revenue the amount of the money corresponding to that price, he knew that the board had paid nothing whatever to Cochran on that account. He knew the check had been received by Cochran, and that the check had come into his possession, and he returned it to Kohn, and said he didn't want it; 'he didn't need it in his business.' He said, also, he supposed Kohn had deposited the check in favor of the treasurer in the bank. He thus knew that the receipt of the treasurer for money received from the board on its face stated a fact which did not exist. That receipt, so far from deceiving him or misleading him, should have put him on guard, and when he knew a check had been received by the treasurer. He didn't ask if the money had been collected, and he didn't tell Kohn to bring him the money, or get the actual cash, and give it to Cochran. He says when he delivered the bonds he supposed the check had been deposited in the bank in favor of the treasurer. This would kill any estoppel, if it could otherwise arise on the theory that the agent of the county was misled into delivering the bonds, and did so on the faith that the price of the bonds had been actually col-

lected in cash by Cochran, before the bonds were delivered to Morris & Company.

"I have not been able to resist the conclusion, after careful examination of the statute and hearing the elaborate argument of counsel as to its proper construction, that the legislature intentionally used words which show a plain design on its part to put on the Board of Revenue the whole duty of looking after the issue, negotiation and sale of the bonds, their delivery to the purchaser and the collection of the price thereof in cash, with the further duty to 'turn over' the proceeds of the bonds to the treasurer after the board had collected them. The design of the law seems manifest that all these important duties were to be looked after by the Board of Revenue, and were in no wise to be dependent upon the performance of any act by the treasurer in connection with any of these duties. There are many reasons of convenience and policy why this should be so. The law intended to keep the whole matter of the sale of the bonds, and the collection of the price thereof, and the turning over of the proceeds to the treasurer, in the hands of the board. In no other way in such a carefully drawn statute, can we account for the language, which is deliberate and plain, fixing a restricted liability or responsibility on the treasurer, and limiting that only as to the safe-keeping of the proceeds 'which come into his hands.' If it was intended for the treasurer to perform any duty in any of these matters (save as to the one specified, put on him), which were affirmatively committed to the board, why did not the act place some duty on the treasurer as to the collecting the price? Why did it use language, which by restricting the treasurer's duty to one thing, and one thing only, for which he should be responsible, certainly excluded the idea of responsibility and duty as to all the rest? The only answer is that the Legislature contemplated that it had clearly fixed all these duties upon the board, and it was, therefore, necessary and proper only to fix liability on the treasurer for the 'safekeeping' of the fund after it had 'come

into the treasurer's hands.' The language of the Act to that effect is plain and unmistakable. If we wrench a different meaning from that conveyed in the plain English of the statute, we trample down all rules of construction, overthrow the will of the Legislature, and put a liability upon the sureties which is unjustifiable for the reasons stated, and also because statutes and contracts must be construed strictly rather than liberally, in favor of sureties in case of doubt. This is the theory of the law which has controlled the Court in its rulings throughout the entire case, which makes it the duty of the Court to give the jury peremptory instructions as to the verdict which the law demands, upon the case now before the Court. The fault with the county's case is not that it has not been earnestly urged, but that nothing can change its facts, upon which the law pronounces against it as to this road and bridge fund.

"The Court charges you to render a verdict in favor of the plaintiff against both the defendants for the sum of $36,869.92."

Filed Sept. 27, 1902.

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Office Supreme Court U. S.
FILED
JUN 28 1905
JAMES H. McKENNEY,
Clerk.

IN THE

Supreme Court of the United States.

OCTOBER TERM, 1904.

No. 34.

JOHN J. COCHRAN AND THE FIDELITY AND DEPOSIT COMPANY OF MARYLAND, *Plaintiffs in Error,*

vs.

THE COUNTY OF MONTGOMERY, *Defendant in Error.*

ERROR TO THE CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT.

And No. 112.

JOHN J. COCHRAN AND THE FIDELITY AND DEPOSIT COMPANY OF MARYLAND, *Petitioners,*

vs.

THE COUNTY OF MONTGOMERY, *Respondent.*

PETITION FOR WRIT OF CERTIORARI TO THE CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT.

BRIEF FOR PLAINTIFFS IN ERROR.

EDGAR H. GANS,
THOMAS A. WHELAN,
For Plaintiffs in Error.

IN THE

Supreme Court of the United States.

OCTOBER TERM, 1904.

No. 279.

JOHN J. COCHRAN AND THE FIDELITY AND DEPOSIT COMPANY OF MARYLAND, *Plaintiffs in Error*,

vs.

THE COUNTY OF MONTGOMERY, *Defendant in Error.*

ERROR TO THE CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT.

And No. 401.

JOHN J. COCHRAN AND THE FIDELITY AND DEPOSIT COMPANY OF MARYLAND, *Petitioners*,

vs.

THE COUNTY OF MONTGOMERY, *Respondent.*

PETITION FOR WRIT OF CERTIORARI TO THE CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT.

BRIEF FOR PLAINTIFFS IN ERROR.

STATEMENT OF THE CASE.

1. This is a case in which a County Treasurer, John J. Cochran, and the surety on his official bond, the Fidelity and Deposit Company of Maryland, plaintiffs in error, have been held liable in the sum of $101,017.90 on account of the

County Treasurer having deposited in a bank, which afterwards failed, a check received from his superior officers governing the county, which, at the time it was received, was worthless, and which he was obliged to receive from them. The details of the case, at its various trials, are as follow:

2. On January 21st, 1902, suit was brought by the county of Montgomery, a county of the State of Alabama, against John J. Cochran, County Treasurer of Montgomery county, and a citizen of Alabama, and the Fidelity and Deposit Company of Maryland, a citizen of Maryland. This suit was brought against the Fidelity and Deposit Company as surety on the bond. The original complaint filed in the City Court of Montgomery is found in the record, pages 5-13. The case was removed from the City Court of Montgomery, an Alabama Court, to the Circuit Court of the United States for the Middle District of Alabama on petition of the Fidelity and Deposit Company of Maryland on the ground of prejudice and local influence. (See Record, pages 1-5-15-17). There was a motion to remand the case to the State Court (see Record, pages 18-20), which the District Judge, Thomas G. Jones, overruled, and filed an elaborate opinion, which is found reported in Montgomery County vs. Cochran, 119 Fed. Rep. 85. The case then went to trial in the Circuit Court of the United States for the Middle District of Alabama, and resulted in a verdict for the plaintiff for $36,986.92, which was not disputed by the defendants. The plaintiff having lost its case on the disputed claim (the road and bridge claim hereinafter explained) amounting, with interest, to $101,017.90, sued out its writ of error to the Circuit Court of Appeals for the Fifth Circuit. That Court affirmed the action of the Federal Court on the removal for prejudice and local influence, but remanded the case on its merits. Its opinion is found reported in Montgomery County vs. Cochran, 121 Fed. Rep. 17. The case went back for a second trial. On the second trial, the plaintiff, in addition to the $36,989.92 recovered in the first trial, and

paid by the defendant because the item was not disputed, secured a judgment for $67,103.05, which was less than the amount claimed. Upon this judgment cross writs of error were sued out from the Circuit Court of Appeals for the Fifth Circuit. That Court decided all points in favor of the plaintiff and remanded the case for a new trial. The opinion is found reported in the Montgomery County vs. Cochran, 126 Fed. Rep. 46. The third trial was simply formal. A writ of error would have been sued out from the Supreme Court of the United States from this second judgment of the Circuit Court of Appeals if the judgment had been final, but the judgment was interlocutory and directed a remand and a new trial. It was necessary to go through the third trial in order that a final judgment could be secured. On this third trial, the plaintiff secured a judgment for the full amount claimed, to wit, $101,017.90. (See Record, page 103.) From this judgment, the defendants sued out their writs of error to the Circuit Court of Appeals for the Fifth Circuit, which Court affirmed the judgment below on April 5, 1904. (See 128 Fed. Rep. 1019; also see Record, page 150). Thus, for the first time, there was a judgment against the defendant in the Circuit Court of Appeals, on which a writ of error could be sued out to the Supreme Court of the United States. From the judgment of the Court of Appeals for the Fifth Circuit, writs of error were sued out by the plaintiffs in error on May 16, 1904. (See Record, pages 158-162). Thereafter, the plaintiffs in error filed their petition in the Supreme Court for a *writ of certiorari*. This petition was filed because of the doubt expressed whether the case was one in which a writ of error would lie to the Circuit Court of Appeals. A motion was also subsequently filed by the defendant in error to dismiss the writ of error; briefs were submitted on both sides, on both questions, to wit: as to the propriety of issuing a *writ of certiorari* and as to the matter of the dismissal of the writ of error. A consideration of both these

questions was postponed by the Court until the final hearing on the merits.

3. The points for the consideration of the Court arise out of rulings on demurrers to various pleadings and rulings on the admissibility of evidence. There are several sets of pleadings in the record, due to the fact that at the second trial the defendants desired to renew the demurrers and pleas successively used by them in the first and second trials, but the Court would not permit this. (Record, pages 102-104.) Again, the separate pleas of John J. Cochran and the Fidelity and Deposit Company thus fully set forth in the record are identical, and the Court need only consider the pleas and demurrers of one of the parties. The only parts of the record, therefore, that the Court need consider are—

1. The complaint, as amended. (Record, pages 21-34.)
2. Demurrers of Fidelity and Deposit Company to complaint. (Record, pages 71-77.)
3. Pleas of Fidelity and Deposit Company. (Record, pages 87-97.)
4. Plaintiffs' demurrers to these pleas. (Record, pages 99-102.)
5. Judgment entry. (Record, pages 102-104.)
6. Bill of exceptions. (Record, pages 104-124.)
7. Assignment of errors. (Record, pages 151-158.)

4. The connected story of the case, taken from these pleadings and the bills of exceptions, is as follows:

John J. Cochran, one of the plaintiffs in error, was elected Treasurer of Montgomery County, Alabama, in August, 1900, and went into office September 1st, 1900. (Record, page 108.) On August 17th, 1900, he gave his official bond with the Fidelity and Deposit Company of Maryland, the other plaintiff in error, as surety. The bond was in the following form:—

"The State of Alabama: Montgomery County:

Know All Men By These Presents, That we, John J. Cochran, of the State and county aforesaid, and the Fidelity

and Deposit Company of Maryland, a corporation of Maryland, as surety, are held and firmly bound unto the county of Montgomery, in the sum of one hundred and twenty thousand dollars ($120,000.00), for the payment of which, well and truly to be paid and done, we bind ourselves, our heirs, executors, administrators and assigns, firmly by these presents.

Seals with our seals and dated this 17th day of August, A. D. 1900.

The condition of the above obligation is such, that whereas the above bound John J. Cochran, was, on the 6th day of August, 1900, elected treasurer of Montgomery County, in and for said county. Now, if the said John J. Cochran shall faithfully discharge the duties of such office during the time he continues therein, or discharges any of the duties thereof, then the above obligation to be void; otherwise to remain in full force and effect.

JOHN J. COCHRAN,
FIDELITY AND DEPOSIT COMPANY OF MARYLAND,
BY R. F. MANLEY, ATTORNEY IN FACT.

Approved and ordered of record, this, the 24th day of August, A. D. 1900.

J. B. GASTON,
Judge of Probate Court, Montgomery County."

(U. S. R. Stamp 1.64.) (Record, page 105.)

Cochran, the real treasurer, did none of the work of the office. He lived twenty-four miles from Montgomery, the county seat. Following the custom in Alabama, he appointed a deputy, who attended to all the duties of the office under the following power of attorney:

"STATE OF ALABAMA, MONTGOMERY COUNTY:

I, JOHN J. COCHRAN, of said county, hereby constitute and appoint John P. Kohn, of Montgomery, Alabama, my true and lawful attorney, to receive and receipt for in my name all moneys coming into my possession as treasurer of the

county of Montgomery, Alabama, and in my name as treasurer, to pay out all moneys required by law to be paid by me, upon checks signed by the clerk of the board of revenue of said Montgomery county; and further to make reports, keep all books required by law to be made or kept by me as such county treasurer, and to do and perform all acts and things I might lawfully do in my own name, as such county treasurer, and I hereby ratify and confirm all the acts and things that may be done by the said John P. Kohn, acting as my agent under the authority of this power, as if the same were done in person by myself.

In witness whereof, I hereunto set my hand and affix my seal, this September 1st, A. D. 1900.

JOHN J. COCHRAN,
As Treasurer of Montgomery County, Alabama.

Witness:
E. P. MORRISETTE,
BIBB GRAVES."

(See Record, page 108.)

The John P. Kohn named in this power of attorney was a clerk in the private banking house of one F. M. Billing, trading under the name of Josiah Morris & Co. It was agreed between Cochran and Billing that the moneys of the county should be deposited in the bank of Josiah Morris & Co., and this was known to the Fidelity and Deposit Company, although this latter company did not know that Kohn was to be the deputy. (Record, pages 108-109.) The books of the county were kept by Kohn in the banking house of Josiah Morris & Co. The general or ordinary funds of the county were kept by Kohn and deposited when collected to the account of the treasurer in the banking house of Josiah Morris & Co. until January 25, 1901, when the bank failed. (Record, page 109.) At the time of the failure, there was still on the books of the bank to the credit of the county, on account of its general fund, the sum of $32,221.80, which, with interest of $4,648.12, amounted, when the judg-

ment was rendered at the first trial, to $36,869.92, which was paid by the Fidelity and Deposit Company without contest or dispute. (Record, page 107.)

The whole controversy is over the liability of the Fidelity and Deposit Company for the special Road and Bridge Fund, amounting, with interest, to $101,017.90. The following is an explanation of this special fund, and the especial circumstances under which the plaintiffs in error are sought to be held liable. Some time after Cochran went into office and had given his official bond, to wit., on the 13th day of December, 1900, the Legislature of Alabama passed the following law (italics ours):

"No. 259. AN ACT S. 86.

To authorize the board of revenue of Montgomery county to issue bonds of said county for an amount not to exceed one hundred thousand dollars for the purpose of building and improving the public roads of the county upon a permanent and well-considered system, and for erecting bridges in said county.

Section 1. Be it enacted by the General Assembly of Alabama, That the *board of revenue* of the County of Montgomery be and are hereby authorized to *issue bonds of said County* of Montgomery to an amount not exceeding one hundred thousand dollars, or so much thereof as said *board of revenue may deem necessary* for the purposes hereinafter named in the sum of one thousand dollars each, and shall be numbered from 'A' 1 to 100 consecutively, and payable at such place or places as said *board of revenue may designate* at such time or times not exceeding forty years from the date thereof, as may be designated by the said board of revenue. Said bonds to bear interest at the rate of not exceeding five per centum per annum, and said bonds shall be exempted from county and municipal taxation. Pro-

vided, that after twenty years from the date of the issue of said bonds, the said *board of revenue may pay off* and *redeem annually* twenty thousand dollars of said bonds, beginning at number one, and running consecutively until all of said bonds have been paid off and discharged.

Section 2. Be it further enacted, That the bonds authorized to be issued under the provisions of this act shall be *signed* by the *clerk of the said board of revenue* of said county and countersigned by the *president of the said board of revenue*, and the seal of the *board of revenue shall be affixed* thereto; and the fac-simile signature of the clerk of said board to the coupons of said bonds shall be equivalent to a manual signature thereof, and the clerk of said board must keep a correct record and account of all the bonds issued and disposed of under this act.

Section 3. Be it further enacted, That the said *board of revenue of said county* of Montgomery are hereby authorized to do any and all things necessary to carry out the provisions hereby granted, either through *themselves or by any agent or agents duly appointed by them* for that purpose, at any time of said board of revenue, whether at a regular or special term thereof, and no technicality, informality, irregularity, neglect or omission in the proceedings or records of said board of revenue shall in any wise vitiate or annul said bonds or coupons, which shall have all the protection of commercial paper.

Section 4. Be it further enacted, That the *board of revenue* of said county are hereby *authorized* to negotiate and *sell such* bonds as are issued by them by virtue of this act, but said bonds shall not be sold for less than par (100 cents on the dollar) *and the proceeds of said bonds shall be paid over to and kept by the treasurer of said county and applied to pay for* the building of and improving the public roads of the county upon a permanent and well considered system, and for erecting bridges in said county; such use, payment and application of said proceeds to be under the direction and

by authority of said board of revenue of said county of Montgomery, *and the said county treasurer to be responsible for the safe keeping of all the proceeds accruing from the sale of said bonds, which may come into his hands in his official capacity, the same as for the other county funds or money in his hands as such treasurer;* and there shall be no commissions paid said county treasurer for disbursing the funds accruing from the sale of the bonds named in this act.

Section 5. Be it further enacted, That it shall be unlawful for said board of revenue or any member thereof, or any of the officers of the said county of Montgomery to apply the proceeds of the sale of any of the bonds issued by authority of this Act to any other purpose than that hereinbefore specified.

Section 6. Be it further enacted, That the coupons attached to said bonds herein authorized to be issued shall, as they respectively mature and become payable, be receivable for county taxes and county dues in said county of Montgomery. Approved December 13, 1900."

In order to more fully understand this statute, which speaks of a board of revenue and the county treasurer, such parts of the statutes of Alabama as define their duties, and which may be necessary to the decision of this case, are herein inserted.

The following Acts of Assembly, and parts of the Code of Alabama show the power of the Board of Revenue and the powers and duties of the Board of Revenue for Montgomery county and the County Treasurer.

No. 353. AN ACT

To Establish a Board of Revenue for Montgomery County.

Section 1. Be it enacted by the General Assembly of Alabama, That there is hereby established a board consisting of five persons, to be called the Board of Revenue of Montgomery County.

Section 2. Be it further enacted, That the members of said board shall be appointed by the Governor, and shall hold their office for the term of four years, and until their successors have qualified, and in case of a vacancy, the same shall be filled by the Governor upon certificate of such vacancy by the remaining members of the board.

Section 3. Be it further enacted, That said board shall have power and authority to direct and control the property of the county, as it may deem expedient, according to law; to levy a general tax for general, and a special tax for particular county purposes, according to the provisions of the Revised Code of Alabama; to examine, settle and allow all accounts and claims chargeable against the county; to examine and audit the accounts of all officers having the care, management, collection or disbursement of money belonging to the county, or appropriated for its use and benefit; to have the exclusive control of the convict labor of the county, and the disbursement of the proceeds of the same, and the sole right and authority to bind the county of Montgomery on any contract for the payment of money.

Section 4. Be it further enacted, That said board shall exercise the same supervising control over the tax collector and tax assessor of said county, their bonds, and removal from office as is now required by law of the Commissioners' Court of said county.

Section 5. Be it further enacted, That said board shall have exclusive jurisdiction of the matter of insolvencies and errors in the assessment and collection of taxes as is now exercised by the Commissioners' Court of said county.

Section 6. Be it further enacted, That said board shall have power and authority to compromise the outstanding debt of Montgomery county; to examine into and pass upon the legality of the warrants already issued; to classify and register outstanding warrants, and may pledge the credit of the county to raise money to discharge the same.

Section 7. Be it further enacted, That said board shall elect one of its members to be presiding officer when in session, and who shall determine all matters in the event of a tie in the vote of the other members, and who shall sign the minutes of the proceedings of the board. And the said board shall also elect another member as clerk, who shall keep an office at or near the Court House of said county, and whose duty it shall be to receive and prepare business and obtain information for the session of said board, and to see to the execution of all orders thereof, and to report to the board all infractions of the revenue law in said county, of which he can obtain authentic imformation; to keep proper records of the proceedings of said board in well bound volumes provided for that purpose, and which shall always be open to the inspection of citizens of said county, and generally, to do and perform such matters as may be required of him by said board. And said board may at any time, change its President or clerk.

Section 8. Be it further enacted, That said board shall hold four sessions annually, viz: On the second Monday of February, and April and November, and on the third Monday in August, and may hold a special session at any time upon the call of the President, or any two members of the board; notice of special sessions shall be given by advertisement for five days before such term in a newspaper published in the city of Montgomery.

Section 9. Be it further enacted, That a majority of said Board shall constitute a quorum for the transaction of business; and no funds belonging to the County shall be drawn except as authorized by said Board, and a proper list and registration of all sums drawn and of the nature of the claim, and of the person in whose favor drawn, shall be kept by the Clerk of said Board.

Section 10. Be it further enacted, That the Clerk of said Board shall receive for his services a salary of not less than one thousand dollars, nor more than fifteen hundred dollars,

according to the extent of his usefulness, to be determined by the other members of the Board; and the other members of the Board shall be allowed two dollars per diem while in session, and mileage at the rate of five cents per mile to and from the place of meeting, the whole compensation, in no case, to exceed the sum of one hundred dollars per annum to any of such members.

Section 11. Be it further enacted, That it shall be the duty of the Clerk of each Court in said County and of the Register in Chancery to render to the said Board within ten days after the adjournment of said Court, a list under oath of all fines and forfeitures taken during such term for the use of the County, and of all taxes upon cases decided at such term.

Approved March 11, 1875.

No. 155. AN ACT

To authorize and require the Board of Revenue of Montgomery county to discharge the duties, and exercise the authority of the Court of County Commissioners of said county.

Section 1. Be it enacted by the General Assembly of Alabama, That the Board of Revenue of Montgomery county shall have all the jurisdiction and the powers which are now, or may hereafter be by law vested in the Court of County Commissioners in this State, and the several members of said Board of Revenue of Montgomery shall respectively perform all the duties and services, and exercise all the powers which are, or may be required by law of the several members of the Courts of County Commissioners.

Section 2. Be it further enacted, That all general laws hereinafter enacted by the General Assembly of Alabama in relation to the jurisdiction, powers, authority or duties of County Commissioners in this State, shall apply to said Board of Revenue of Montgomery county, except so much of such general laws as may relate to the mode of selecting

the members of said Courts of County Commissioners; PROVIDED, that this Act shall not be construed to impair the jurisdiction and authority of said Board of Revenue of Montgomery county as now established by law.

Section 3. Be it further enacted, That the Court of County Commissioners of Montgomery county, as organized at the passage of this Act, be and the same is hereby abolished.

Approved February 9, 1877.

No. 587. AN ACT

To regulate the finances of Montgomery County.

Section 1. Be it enacted by the General Assembly of Alabama, That it shall be the duty of the clerk of the Board of Revenue of Montgomery county to procure and keep one or more well bound books in which he shall enter all payments made to or for the benefit of the county of Montgomery, stating the name of the person by whom each such payment is made, the amount and date of each such payment, and for what or on what account each such payment was made.

Section 2. Be it further enacted, That the payments made for or on account of the fine and forfeiture fund of said county shall be kept separate from the payments made on account of the general fund of the county, until claims against such fine and forfeiture shall be worth their face value, and so soon as claims against the fine and forfeiture fund are worth their face value, then all moneys belonging to such fund shall be paid into and form a part of the general fund of the county, and claims against the fine and forfeiture fund shall afterwards be paid just as any other claims against the county are now paid.

Section 3. Be it further enacted, That the fund kept separate on the books of said county as the costs of prosecution fund, shall be kept separate and apart as is now managed until such time as claims against said fine and forfeiture

fund shall be worth par value, when the said costs of prosecution fund shall be transferred to and form part of the general fund of said county, and claims against it shall afterwards be paid just as claims against the general fund are now paid.

Section 4. Be it further enacted, That whenever any person shall pay any money to or for the benefit of the county of Montgomery, he shall demand from the treasurer or such other person to whom he may pay any money, duplicate receipts, one of which he shall deliver to said clerk of the Board of Revenue of Montgomery County; and no payment of money by any person to said county shall be held as valid until such receipt is filed with said clerk.

Section 5. Be it further enacted, That as claims against said fine and forfeiture fund are worth their face value, then the pay of all witnesses summoned on behalf of the State shall be one dollar per day, and shall be paid as jurors are paid, and witnesses before the grand jury shall duly be paid mileage according to the present rate of mileage.

Section 6. Be it further enacted, That said clerk of the Board of Revenue shall receive, as compensation for the increased labor imposed upon him by this Act, such sum per month as shall be allowed by said Board of Revenue of Montgomery County, to be paid in addition to the salary now allowed him by law.

Section 7. Be it further enacted, That all laws and parts of laws in conflict with the provisions of this Act be, and the same are hereby repealed.

Approved February 28, 1889.

The powers of the Board of County Commissioners are defined by chapter 22, section 958. The board has authority—

1. To direct and control the property of the county as it may seem expedient according to law.

2. To levy a general tax, or a general or special tax for particular county purposes, according to the provisions of this Code.

3. To examine, settle and allow all claims and accounts chargeable against the county.

4. To examine and audit the accounts of all officers having the care, management, election or disbursement of money belonging to the county.

Sections 5, 6 and 7 are immaterial to this case.

The County Treasurer.

It is his duty "to receive and keep the money of the county, and to disburse the same according to law" (Code, sec. 1429, sub-division 1); "demand and receive all moneys due the county" (Code, sec. 1429, sub-division 10); "keep an account of all receipts and disbursements" (Code, 1429, sub-division 9); "and to submit to the Board of Revenue an annual report at the first term of each year, and to make reports to it when required, and to make an annual report to the probate judge." (Code, 1429, sub-divisions 11, 12 and 13.)

By the Act of February 28, 1889, entitled, "An Act to Regulate the Finances of Montgomery County," it was provided in section 4 as follows:

"Section 4. Be it further enacted, That whenever any person shall pay any money to or for the benefit of the county of Montgomery, he shall demand from the treasurer, or such other persons to whom he may pay any money, duplicate receipts, one of which he shall deliver to the said clerk of the Board of Revenue of Montgomery County; and no payment of money by any person to such county shall be held as valid unless such receipt is filed with said clerk."

From these statutes, it is apparent that there are two elements in the county dealing with the county finances. The Board of Revenue stands for the county itself; it has all the powers of a Board of County Commissioners; it

orders and directs what shall be done with the property, according to law; it is the organized instrumentality by which the county governs its finances under the law. The county treasurer, on the other hand, is the officer who safely keeps the money of the county and disburses the same under the orders of the Board of Revenue.

By this Act of December 13, 1900, the Board of Revenue were authorized to issue bonds of the connty, signed by the clerk of the board, and countersigned by its president, to an amount not exceeding $100,000, and to negotiate and sell the same to procure a special road and bridge fund for the county. Accordingly, on January 7, 1901, the board having duly issued $100,000 of the bonds, negotiated and sold the same to Josiah Morris & Company for $111,109.58. (Record, page 115.) On the following day, to wit., the 8th of January, about three or four o'clock in the afternoon, Josiah Morris & Company drew a check on themselves for the payment of the bonds, which check is in the following form:

"Montgomery, Alabama, January 8, 1901.

JOSIAH MORRIS & COMPANY: Pay to the order of John J. Cochran, county treasurer, one hundred and eleven thousand one hundred and nine and 58-100 dollars.

(Signed) JOSIAH MORRIS & COMPANY,
(Record, page 110.) By KOHN."

This check was signed by Kohn, on behalf of Josiah Morris & Company, and taken by him about 4 o'clock in the afternoon of the 8th of January, after banking hours, as payment for the bonds. Some conversation passed between Kohn and Allen, the clerk of the Board of Revenue, which will be hereafter more fully detailed. The substance of it was that Allen did not want the check, but a receipt. Accordingly Kohn went back to the bank of Josiah Morris & Company, where, as hereinbefore stated, he kept, as

deputy treasurer, the treasurer's books and accounts, and got a blank form of receipt out of the county treasurer's book, and filled it in in the following way:

"THE STATE OF ALABAMA, MONTGOMERY COUNTY.

No. 507. Office of County Treasurer.

Received from the Board of Revenue of county, one hundred and eleven thousand, one hundred and nine 58-100 dollars proceeds sale $100,000 bonds.

(Signed) JOHN J. COCHRAN,
County Treasurer.

Duplicate. By JOHN P. KOHN, his Attorney."

(Record, page 110.)

Kohn carried this receipt and handed it to Allen, and Allen delivered him, on behalf of the Board of Revenue, the $100,000 of bonds, which Kohn delivered to the bank. (Record, page 110.)

These bonds were shipped away from Montgomery by Josiah Morris & Company on the evening of January 8, 1901, to the Western National Bank of New York. (Record, pages 110-112.) At the time this check was made out by Josiah Morris & Company, payable to their own order, which was, in effect, a promissory note, Josiah Morris & Company were insolvent, and the check was worthless. This is fully alleged in the pleas filed by the defendants, to which demurrers were sustained. (See Record, pages 87-97.) Full evidence was offered also to prove the same, which evidence, although admitted in the first and second trials, was ruled out in the third trial, and exceptions duly reserved. (See Record, pages 111-118.) Exactly what transpired between Kohn and Allen when the check was taken for delivery, is told by these two witnesses, and their evidence is substantially the same.

Kohn testifies: "I handed the check to Allen, clerk of the Board of Revenue. He looked at it, handled it in an indifferent way, and said: 'Well, I don't need this, it

belongs to you, you take it. Just bring me a receipt,' or words to that effect." (Record, page 110.) He said: "You are the County Treasurer, I don't need it in my business, bring me a receipt." (Record, page 111.) He further testifies that after going back to the bank and getting the receipt, he did not tell Allen he had collected the money for the bonds, and made no remark to Allen from which he could infer any such thing. The only thing he received from Allen was the check; no money of any kind.

Mr. Charles A. Allen, who was the clerk of the Board of Revenue, and acting for them in receipt of the check and the delivery of the bonds, testifies: "When Kohn came for the bonds, he offered me a check payable to John J. Cochran, treasurer, drawn by Kohn, and payable to Josiah Morris & Company, on Josiah Morris & Company, for $111,109.58. I told Kohn I did not need the check in my business; that it was for the county treasurer, to take it back and bring me a receipt for the money and I would give him the bonds. He went off and brought back the receipt, was gone about half an hour. This was about 3 o'clock in the afternoon. He handed me the receipt and I gave him the bonds. I gave him the bonds on the faith of the receipt."

The defendants also asked Allen the following questions, which were admitted at the former trials, but excluded at the third trial, to which exclusion exceptions were duly reserved and assignments of error properly stated. The defendants asked Allen the following questions:

"Q. Did you think at the time Kohn brought the receipt and got the bonds that he had deposited the check in the bank to the credit of Cochran, county treasurer?" The Court, on objection, said it would hear the answer before ruling. The witness answered: "I can't say as to that. I, of course, thought the county treasurer was all right, or would not have given the bonds."

"Q. What?

"A. If I had thought that the money was not in the county treasury all right, I would not have given up the bonds. The only way I thought Kohn had gotten the money was by depositing the check in the bank. The only way I knew he had the money was by his receipt. I thought Josiah Morris & Company were solvent at the time of the delivery of the bonds. I thought the check was good. I did not take the check; it was not payable to me but to John J. Cochran, treasurer; I had no right to it at all; I was bound to have a voucher in my office.

"Q. Didn't you treat the check as money?

"A. I did not take the check; it was not payable to me at all. It was payable to John J. Cochran, as county treasurer, and I had no right to take it."

Allen was further questioned:

"Q. You parted with the bonds, you wanted a voucher in your office. At the time he brought the check, you thinking check given by a solvent bank, and being payable to Cochran, as county treasurer, if he had brought the receipt at that time and handed you the check and the receipt, you would have given him the bonds?

The question was objected to, but the Court before ruling heard the answer of the witness.

A. Certainly I would on his receipt.

The answer was then excluded by the Court.

Q. If instead of going back because he did not bring the receipt first, if at that time he brought the check and tendered it to you, and you said you did not need that, you did not need that in your business, that Cochran was county treasurer, if at that time he brought the receipt and handed you the receipt, then you would have given him the bonds at that time, would you not?—A. Yes, I would. There was no conversation that I know of between me and Kohn at the time he gave me the receipt that I know of; only gave him the bonds—that is all that I recollect.

Q. It was after banking hours, did you think he had deposited the check after banking hours that day?—A. I did not have any right to think about it. I was only recognizing the county treasurer. I thought that was all I had to do with it. I would have taken the receipt at the time the check was offered, all I wanted was a voucher according to the ordinary course of business. (Record, pages 115-117.)

After Kohn received the check, he took it to the bank and regularly deposited it with Josiah Morris & Company to the credit of John J. Cochran, county treasurer, road and bridge fund, and made an entry on the treasurer's books for $111,109.58, received as proceeds of $100,000 of bonds. (Record, page 110.)

The following sections of the Alabama Code contains pertinent statutory matter, section 3087:

"Every official bond is obligatory upon the principal and sureties thereon—

1. For any breach of the condition during the time the officer continues in office, or discharges any of the duties thereof.

2. For the faithful discharge of any duties required of such officer by any law passed subsequent to the execution of such bond although no such condition be expressed therein.

3. For the use and benefit of every person who is injured at all by any wrongful act committed under color of his office, as by his failure to perform, or the improper or negligent performance of those duties imposed by law."

The Code of Alabama, section 4668, provides that:

> "Any probate judge, clerk of a court of record, registrar in chancery, sheriff, coroner, tax collector, county treasurer, trustee of public schools, notary public, justice of the peace, constable, or other public officer, who

knowingly converts to his own use, or permits another to use the revenues of the State, or of any county thereof, or any money paid into his office, or received by him in his official capacity, is liable to indictment, and upon conviction must be punished as if he had stolen it."

The questions arising from these stated facts, and the method by which they arise, are as follows:

1. *Did the County Treasurer receive any proceeds from the sale of the bonds within the meaning of the Alabama law?*

This question is raised on the demurrers to all the pleas. (See assignments of error, 8-15.) It is also raised on the charge of the Court to find for the plaintiff on the evidence, and the refusal to charge to find for the defendants on the evidence. (See assignments of error, 23-24-26.)

2. *Is the Fidelity and Deposit Company responsible on its bond upon any theory of estoppel as to the receipt of such proceeds?*

This question is raised by the demurrer to the sixth count in the complaint (see fifth assignment of error), and on the Court's refusal to charge that, if the jury believe the evidence there can be no verdict against these defendants, on the sixth count. (See assignments of error, 26.)

Are the plaintiffs in error liable for anything but the actual value of the check received by the treasurer?

This question is raised by the refusal of the Court to charge "that the measure of damages under the eighth count is the value of the check received"—also by the rulings of the Court on the admissibility of evidence of insolvency. (See assignments of error, 27 and 16 to 22.)

ASSIGNMENTS OF ERROR RELIED UPON BY THE PLAINTIFFS IN ERROR.

5. The Court erred in affirming the judgment of the Circuit Court to the sixth count of the complaint.

6. The Court erred in affirming the judgment of the Circuit Court in overruling the demurrer to the seventh count of the complaint.

7. The Court erred in affirming the judgment of the Circuit Court in overruling the demurrer to the eighth count of the complaint.

8. The Court erred in affirming the judgment of the Circuit Court in sustaining the demurrer to plea A.

9. The Court erred in affirming the judgment of the Circuit Court in sustaining the demurrer to plea B.

10. The Court erred in affirming the judgment of the Circuit Court in sustaining the demurrer to plea C.

11. The Court erred in affirming the judgment of the Circuit Court in sustaining the demurrer to plea D.

12. The Court erred in affirming the judgment of the Circuit Court in sustaining the demurrer to plea E.

13. The Court erred in affirming the judgment of the Circuit Court in sustaining the demurrer to plea F.

14. The Court erred in affirming the judgment of the Circuit Court in sustaining the demurrer to plea G.

15. The Court erred in affirming the judgment of the Circuit Court in sustaining the demurrer to plea H.

16. The defendants in the Circuit Court asked the witness, Kohn, the following question, to-wit: "What amount of cash was there in the bank of Josiah Morris & Company on the 8th and 9th of Janurary, 1901?" The plaintiffs objected to said question as calling for illegal and irrelevant testimony. The Court said he would hear the answer of the witness before ruling. The witness answered: "$35,000." The plaintiff moved the Court to exclude said answer as evidence, upon the ground that it was illegal and irrelevant testimony. The defendants stated that the object of offering the testimony was to show the condition of the bank on the day the check was given and upon the day afterwards. The Court sustained the said motion to exclude said testimony, and

the defendants, John J. Cochran and the Fidelity and Deposit Company of Maryland in open court and before the jury retired, severally excepted to said action of the Court.

The Circuit Court of Appeals erred in affirming the judgment of the Circuit Court in sustaining the motion to exclude said testimony.

17. The defendants asked the witness, Kohn, the following question, to wit: "How long did the $95,000, which Josiah Morris & Company borrowed on the pledge of the bonds, remain in the Western National Bank?" The plaintiff objected to said question as calling for irrelevant and illegal testimony. The Court said he would hear the answer before ruling, and the witness answered: "I could not tell how long the credit remained with the Western National Bank, checks for several days were drawn against this credit. There were checks to Hubbard, cashier of Capital City Bank for $7,500, on the 10th day of January, 1901; to Louis B. Farley, for $10,000 the same day; on the 11th of January, $11,000 to Union Bank of Nashville; on January 12th, National Park Bank, $18,000; on January 14th, Union Banking and Trust Company, $10,000; on the 8th and 9th of January, 1901, the credit given by the Western National Bank was not available." The plaintiff moved to exclude the answer, upon the ground that it was irrelevant and illegal. The defendants stated that the evidence was offered to show the condition of the bank and its insolvency. The Court sustained said motion to exclude said testimony, and the defendants, John J. Cochran and the Fidelity and Deposit Company of Maryland, in open court and before the jury retired, severally excepted to said ruling of the Court.

The Circuit Court of Appeals erred in affirming the judgment of the Circuit Court in sustaining said motion to exclude said testimony.

18. In the Circuit Court, the defendants asked the witness Kohn, to what extent Josiah Morris & Company was over-

drawn in the Hanover National Bank on the 8th and 9th of January, 1901. The plaintiff objected to said question; the Court said he would hear the testimony before ruling. The witness testified that Josiah Morris & Company, on the dates asked about, were overdrawn in the Hanover National Bank in the sum of $85,000 to $95,000 and perhaps to the extent of $120,000. The plaintiff moved to exclude said answer, the Court granted said motion, and the defendants, John J. Cochran and the Fidelity and Deposit Company of Maryland, in open Court, and before the jury retired, severally excepted to said action of the Court.

The Circuit Court of appeals erred in affirming the judgment of the Circuit Court in granting the motion to exclude this testimony.

19. In the Circuit Court, the following agreement was made: It was admitted, subject to objection as to its legality and relevancy, that after the failure of Josiah Morris & Company an agreement in writing by which the time of payment by Josiah Morris & Company of the amounts due to said creditors was extended, so that Josiah Morris & Company would pay to each of said creditors the following percentages on their respective debts at the times mentioned viz., 12½ per cent. July 1, 1901; 12½ per cent. December 1, 1901; 25 per cent. July 1, 1902; 25 per cent. January 1, 1903, and 25 per cent. July 1, 1903. That this agreement was made with Josiah Morris & Company by Cochran, treasurer, by and with the consent of the board of revenue of Montgomery county, and by and with the consent of the Fidelity and Deposit Company of Maryland, but with the distinct understanding that said agreement, so made between Cochran and Josiah Morris & Company, should not in any manner affect or waive any right which either party had, at the time of making the said agreement, as to the prosecution or defense of any suit which might arise on this matter against the treasurer of the county or his surety; it is further agreed that the dividend agreed to be paid July

1, 1901, was paid July 2, 1901, to all the creditors of Josiah Morris & Company, and that on account of the road and bridge fund involved in this case amounting to $104,592.42, there was paid to Cochran 12½ per cent., amounting to $13,074.05, and that dividend payable December 1, 1901, was paid June 14, 1902, to all creditors of Josiah Morris & Company, and that on account of the road and bridge fund involved in this case, amounting to $104,592.42, there was paid to Cochran 12½ per cent. June 14, 1902, amounting to $13,074.05, and that nothing has been paid since to Cochran or to any other person creditor of Josiah Morris & Company. This agreement was entered into for the purpose of saving time in the production of formal proof, but the facts therein stated, except as to the two payments of $13,074.05, on the dates set out, were duly objected to by plaintiff, and plaintiff moved to exclude the same on the ground that the said facts so set out are illegal and irrelevant as evidence. The Court sustained the said motion of the plaintiff and excluded from the jury the facts admitted to be true in the said agreement, except the facts not objected to. To this ruling of the Court, John J. Cochran and the Fidelity and Deposit Company of Maryland then and there, in open Court and before the jury retired, severally excepted to said ruling of the Court,

The Circuit Court of Appeals erred in affirming the judgment of the Circuit Court in sustaining the motion of the plaintiff to exclude the aforesaid testimony.

20. In the Circuit Court, the defendants asked the witness, Allen: "Did you think at the time Kohn brought the receipt and got the bonds, that he had deposited the check in the bank to the credit of Cochran, county treasurer?" The plaintiff objected to said question on the ground that it called for irrelevant and illegal testimony, and that plaintiff could not be bound by what Allen thought. The Court said he would hear the answer before ruling, and the witness answered: "I can't say as to that. I, of course, thought the county

treasurer was all right, or would not have given the bonds. Q. What? A. If I had thought that the money was not in the county treasury all right, I would not have given up the bonds. The only way I thought Kohn had gotten the money was by depositing the check in the bank. The only way I knew he had the money was by his receipt. I thought Josiah Morris & Company were solvent at the time of the delivery of the bonds. I thought the check was good. I did not take the check; it was not payable to me but to John J. Cochran, treasurer; I had no right to it at all. I was bound to have a voucher in my office. The plaintiff then moved to exclude that part of the answer of the witness in which he said: "I thought Josiah Morris & Company were solvent at the time of the delivery of the bonds. I thought the check was good," upon the same grounds of objection to the question. The Court granted the said motion and excluded said answer as evidence. The defendants, John J. Cochran and the Fidelity and Deposit Company of Maryland, then and there in open court, before the jury retired, severally excepted to said action of the Court.

The Circuit Court of Appeals erred in affirming the judgment of the Circuit Court in granting the said motion and excluding the said answer as evidence.

21. In the Circuit Court, the witness Allen was asked the following question: "You parted with the bonds, you wanted a voucher in your office. At the time he brought the check, you, thinking the check given by a solvent bank, and being payable to Cochran, as county treasurer, if he had brought the receipt at that time and handed you the check and receipt you would have given him the bonds." The plaintiff objected to so much of said question commencing with "at the time he brought the check, you, thinking the check given by a solvent bank, and being payable to Cochran, as county treasurer, if he had brought the receipt at that time and handed you the check and receipt you would have given him the bonds?" for the reason that

the question called for illegal and irrelevant testimony. The Court said before ruling he would hear the answer of the witness. The witness then answered: "Certainly I would, on his receipt." The plaintiff moved to exclude said answer, the Court sustained said motion, and the defendants, John J. Cochran and the Fidelity and Deposit Company of Maryland, then and there, in open Court and before the jury retired, severally excepted to said action of the Court.

The Circuit Court of Appeals erred in affirming the judgment of the Circuit Court and sustaining the motion to exclude said answer, and in excluding said answer.

22. In the Circuit Court, the witness, Berney, testified: "I am president of the Fourth National Bank and was appointed receiver of Josiah Morris & Company, January 1, 1903. After my appointment as receiver I presented an order of the Court to Mr. Billing. He opened the vault, gave me the keys, turned over what was there, did not say that was all. I have collected $200 out of the assets of Josiah Morris & Company. As far as I have seen, the assets were of very little value." The plaintiff moved to exclude said testimony of the witness, Berney, upon the ground that the said testimony was irrelevant and illegal. The Court sustained the said motion, and the defendants, John J. Cochran and the Fidelity and Deposit Company of Maryland then and there in open court, and before the jury retired, severally excepted to said action of the Court.

The Circuit Court of Appeals erred in affirming the judgment of the Circuit Court in excluding the testimony of said witness, Berney.

23. In the Circuit Court, the Court charged the jury, as follows: "If you believe the evidence you will find a verdict for the plaintiff. You will render a special verdict in this cause. You will show by your verdict the amount still due, counting no interest, the amount still due including interest from the 21st of January, 1902, when this suit

was commenced, and the amount due including interest from the date of the conversion, January 8, 1901." The defendants, John J. Cochran and the Fidelity and Deposit Company of Maryland, in open Court and before the jury retired, severally excepted to that part of the said charge of the Court in words, as follows: "If you believe the evidence, you will find a verdict for the plaintiff."

The Circuit Court of Appeals erred in affirming that part of the charge of the Circuit Court in words as follows: "If you believe the evidence, you will find a verdict for the plaintiff."

24. The defendants, John J. Cochran and the Fidelity and Deposit Company of Maryland, requested the Court in writing to charge the jury as follows, viz:

"1. That if they believe the evidence in this case, they will find a verdict in favor of said defendants." The Court refused to give said charge to the jury, and John J. Cochran and the Fidelity and Deposit Company of Maryland in open Court, and before the jury retired, severally excepted to said ruling of the Court.

This charge was asked upon the proposition that under the Act approved December 13, 1900, introduced in evidence, Cochran, as treasurer of Montgomery county, was not responsible for any part of the road and bridge fund until the same came into his hands and upon the evidence that no money proceeds of said road and bridge fund ever came into the hands of said Cochran, as treasurer, nor into the hands of anyone authorized by him. This charge was also asked upon the proposition that Cochran being treasurer of the plaintiff and the sole custodian of its money, the plaintiff could not maintain this suit and recover a judgment against the said Cochran for any of the funds of plaintiff which it was the duty of Cochran to keep, so long as said Cochran remained in the office of treasurer of the plaintiff.

The Circuit Court of Appeals erred in affirming the refusal of the Circuit Court to charge the jury as follows: "That if

they believe the evidence in this case, they will find a verdict in favor of said defendants.

25. The defendants, John J. Cochran and the Fidelity and Deposit Company of Maryland, requested the Court, in writing, to give to the jury the following charge, viz. 2. That if the jury believe the evidence there can be no verdict against these defendants on the sixth count. The Court refused to give the said charge to the jury, and the defendants, John J. Cochran and the Fidelity Deposit and Company of Maryland, in open Court, and before the jury retired, severally excepted to said ruling of the Court.

This charge is based upon the proposition that the sixth count charges that Allen, clerk of the board of revenue, parted with the $100,000 of bonds upon a false representation made to him, said Allen, that Cochran, or his deputy, had received from Josiah Morris & Company the money for said bonds, and upon the evidence of Allen and of Kohn, which shows that Allen did not have any such belief and did not part with said bonds upon such representation.

The Circuit Court of Appeals erred in affirming the judgment of the Circuit Court in refusing to charge the jury as follows: That if the jury believe the evidence, there can be no verdict against these defendants on the sixth count.

26. The defendants, John J. Cochran and the Fidelity and Deposit Company of Maryland, requested the Court in writing to charge the jury as follows: "3. That if the jury believe the evidence there can be no recovery against these defendants under the 1st, 2d, 3d, 5th and 7th counts. The Court refused to give the said charge to the jury, and John J. Cochran and the Fidelity and Deposit Company of Maryland, in open Court, and before the jury retired, excepted to said action of the Court.

This charge was asked upon the hypothesis that as the evidence shows no money ever reached the hands of Cochran, he could not convert the same, and upon the further propo-

sition that no proceeds of the bonds, except the check drawn by and in the name of Josiah Morris & Company, ever reached the hands of Cochran, and that if any conversion occurred, it was of the check and not of the money.

The Circuit Court of Appeals erred in affirming the action of the Circuit Court in refusing to charge the jury as follows: That if the jury believe the evidence there can be no recovery against the defendants severally under the first, second, third, fifth and seventh counts.

27. The defendants, John J. Cochran and the Fidelity and Deposit Company of Maryland, requested the Court in writing to give to the jury the following charge: "4. That the measure of damages under the eighth count is the value of the check received." The Court refused to give the said charge, and John J. Cochran and the Fidelity and Deposit Company of Maryland, in open Court, and before the jury retired, severally excepted to said action of the Court.

This charge was asked upon the proposition that the eighth count seeks to recover of the defendants for the failure of Cochran to collect the check given as the proceeds of the bonds, and that the measure of damages for the failure to collect the said check must be what the said Cochran could have collected on said check had he acted with reasonable diligence.

The Circuit Court of Appeals erred in affirming the action of the Circuit Court in refusing to give the jury the following charge: "That the measure of damages under the eighth count is the value of the check received."

Points.

I.

The duty of the Treasurer was only to safely keep actual money, delivered to him in his official capacity as the proceeds of the bonds by the Board of Revenue.

1. It will be remembered that this bond was executed on August 24, 1900, and that Cochran did not go into office

until September 1. At that time only the ordinary duties of the treasurer were within the real contemplation of the parties. The special obligation as to the road and bridge fund was not created or defined until December 13, 1900, when the Act authorizes the bonds approved. Of course, this would not be a defence in itself, as by the Alabama code, section 3087, the bond is liable for duties imposed by law, subsequently proved; *but the duty must be found in the subsequent law.*

As said in *McKee vs. Griffin, 66 Alabama 216:*

> "Our rulings in this case, following both the language of the statutes and the uniform ruling of other Courts, have been that, while the Legislature may cast new duties upon an officer and hold his sureties on a bond previously executed for their faithful performance, yet their liability is limited to duties enjoined, imposed or sanctioned by law. In other words, the duty for the disregard or violation of which complaint is made, or in reference to which the wrongful act is committed, must be one imposed or authorized by law."

So that the obligation in this case cannot be found in the general duties of the Treasurer or in acts done *colori officii*, or in any form of equitable estoppel, but must be strictly found to be imposed by the subsequent statute. In its terms must the liability be found.

2. Again, the suit is against a surety. He has a right to rely on the letter of his contract and ask for a strict interpretation. There are some classes of surety or fidelity bonds in which this rule is relaxed, but this is only in those cases where the form of the bond is prepared by the attorneys for the surety company, who are at liberty in drafting the instrument, to protect the surety by as many special conditions or stipulations as they may deem advisable. But the old rule of strict interpretation always applies

when the form of the bond is not fixed by the surety company, but regulated entirely, as in this case, by statute law.

Marsh vs. Fidelity Co., 79 Md. 309.
Hill vs. Fidelity Co., 88 Md. 111.
Thompson vs. Am. Surety Co., 56 N. Y. App. Div. 113.
Frost Law of Guarantee Insurance, sec. 171.

3. The Act of December 13, 1900, which authorized the issue of $100,000 of county bonds for bridge and road purposes, divided the duties imposed by the Act between the Board of Revenue and the County Treasurer.

(a) *Duties imposed on Board of Review.*

By a critical examination of the Act, *supra*, page , it will be seen that the *Board of Revenue* was authorized to issue the bonds; the *Board of Revenue* was to designate the time and place of payment; the *Board of Revenue* was to pay off and redeem annually twenty thousand dollars of the bonds; the bonds were to be signed by the clerk of the *Board of Revenue;* the seal of the *Board of Revenue* was to be affixed thereto; that the *Board of Revenue* was authorized to do all things necessary to carry out the provisions of the Act; that the *Board of Revenue* was authorized to negotiate and sell the bonds; that the *Board of Revenue* was to pay over the proceeds to the treasurer and direct the application of the proceeds for the erection of bridges and the building and improvement of the public roads of the county.

(b) *Duties Imposed on the Treasurer.*

These duties are specifically fixed by section 4 of the Act.

"The proceeds of said bonds shall be paid over to and KEPT BY THE TREASURER OF SAID COUNTY and applied to pay for the building of and improving the public roads of the county upon a permanent and well considered system, and for erecting bridges in said county; such use, payment and

application of said proceeds to be under the direction and by the authority of said Board of Revenue of said county of Montgomery, and THE SAID COUNTY TREASURER TO BE RESPONSIBLE FOR THE SAFE KEEPING OF ALL THE PROCEEDS ACCRUING FROM THE SALE OF SAID BONDS WHICH MAY COME INTO HIS HANDS IN HIS OFFICIAL CAPACITY, THE SAME AS FOR OTHER COUNTY FUNDS OR MONEYS IN HIS HANDS AS SUCH TREASURER."

This comparison of duties shows that the *Board of Revenue*, which is really the county in its organized corporate capacity, was to issue and sell the bonds, collect the proceeds and pay them over to the treasurer.

The treasurer had no responsibility as to this special fund until it had been paid over to him by the Board of Revenue. When so paid it would be in "his hands in his official capacity." Until this essential condition was complied with by the Board of Revenue the treasurer had no duty as to the proceeds. The law expressly gives to the Board of Revenue the authority "to negotiate and sell" the bonds, and then provides that the "proceeds of said bonds shall be paid over to" the treasurer. Who is to pay over these proceeds? Evidently the Board of Revenue which is authorized to negotiate and sell the bonds. "Proceeds" are the results from the sale of a thing of value in the hands of the vendor; until the amount is paid by the vendee to the vendor it is merely a debt. So the expression "pay over" indicates that the vendor after having received the "proceeds" is directed to turn them over to the treasurer. The statute was dealing with the duties of the Board of Revenue and the treasurer in relation to this special fund. The direction, therefore, to "pay over" the "proceeds" to the treasurer must refer to the Board of Revenue and not to the purchaser of the bonds. If the statute had meant to provide that the price of the bonds should be paid by the purchaser directly to the treasurer in such a way as to impose on the treasurer the duty of *collecting* such price, it would have said so.

The duty of the treasurer begins only when the "proceeds" are "paid over" to him in "his official capacity."

Now that we have found the *punctum temporis* when the duty of the treasurer begins, what is that duty?

It must be remembered that the duty of the treasurer as to this fund is a *new duty* imposed after the execution of the bond by a special Act. The general duties of the treasurer as to the general funds of the county had already been fully provided for by law. If it had been the intention of the Legislature that the duties of the treasurer as to the special fund should be the same as his duties under the law as to the general or ordinary funds of the county, there would have been no necessity for making any special provisions in this Act of 1900 defining his duties.

There was, however, one important fact which made the special provisions of the law of 1900 necessary. In all other cases the money of the county came to the treasurer from third persons. It was money due the county. With respect to this class of funds, the duty of the treasurer was two-fold. He was obliged (1) to collect the fund. (2) To supply, keep and disburse it under the order of the Board of Revenue. This class of ordinary county funds is covered by the Code provisions regulating the duty of the treasurer —*e. g.*

> "To receive and keep the money of the county and to disburse the same according to law." (Code, sec. 1429, sub-div 1.)
>
> "Demand and receive all moneys due the county." (Code, sec. 1429, sub-div. 10.)

But under the Act of 1900 the special fund thereby created was a fund which in the intent of the law was to be collected by the Board of Revenue and paid over by it to the treasurer. Under such a law there could be but one duty imposed on the treasurer, to wit: to safely keep the money and disburse it according to law. Accordingly we find that such is the precise definition of his duties:

"The proceeds of said bonds shall be paid over to and *kept by the treasurer* and applied * * * under the direction and by the authority of the said Board of Revenue of Montgomery county." * * *

"*And the said county treasurer to be responsible for the safe keeping of all the proceeds accruing from the sale of said bonds, which may come into his hands in his official capacity, the same as for other county funds or money in his hands as such treasurer.*"

The duty of the treasurer, excluding the obligation to disburse according to law, which is not involved in this case, is to keep the proceeds; to safely keep them; to safely keep them only after they come into his hands in his official capacity; to keep them just as other county funds or money in his hands as said treasurer. This is the plain and obvious meaning of the words used. No amount of ingenious reasoning can construe away their force.

There is in this Act no duty as to treasurer to collect the proceeds or to be responsible for their non-collection. If the idea had been to make the treasurer liable, as in the case of the general funds, which involves the duty of collection from third persons, as well as the duty of "safely keeping," then the phraseology of the statute would never have been employed. In the vigorous language of Judge Jones:

> "The language of the Act to that effect is plain and unmistakable. If we wrench a different meaning from that conveyed in the plain English of the statute, we trample down all rules of construction, overthrow the will of the Legislature, and put a liability upon the sureties which is unjustifiable for the reasons stated, and also because statutes and contracts must be construed strictly rather than liberally, in favor of sureties, in case of doubt."

Inasmuch as these proceeds were to come from the county itself, through its Board of Revenue, there was no reason for providing for the collection or reception of the proceeds on the part of the treasurer.

It is suggested that the treasurer has the duty of receiving the proceeds, and the proper performance of this duty requires him to take nothing but money. But no such duty is imposed by the Act. It was simply taken for granted that what proceeds were collected by the Board of Revenue and paid over to the treasurer would be received by him. The probability of his declining to take what was paid to him by the Board of Revenue was not considered or provided for in the Act of 1900. The general statute providing for the receipt of money of the county evidently applied to receipt of money from third persons due to the county. It is a well settled rule that when there is a general statute referring to duties generally and then a special act referring to a special duty, the special act controls exclusively as to that special duty. Specific terms are not enlarged by general words as against a bond with sureties.

City vs. Hughes, 65 Ala. 201.
Morrow vs. Wood, 56 Ala. 1.

By what principle of construction is the liability of Cochran as to this specially imposed duty to be gathered, not from the terms of the act which imposed the duty and carefully defines it, but from a general statute which did not have this duty in contemplation?

Now by the express terms of this Act of 1900, the duty of Cochran as to this special fund is expressly limited to the safekeeping of the fund after it gets into his hands. Whatever may be his duty as to other funds, as to this fund it is limited as stated. By what principle of construction can you add on by mere implication, against sureties, a new duty not contained in the Act itself? The general law provides that the treasurer shall "receive and keep" the money

of the county. The special law provides merely that he shall "safely keep" it after it comes into his hands. The very fact that one statute provides for receiving as a duty and the other carefully omits it, ought to be sufficient to show that there is no breach of duty if receiving under the latter the breach of which would make the bond liable.

There is no duty, therefore, under this law upon the treasurer until the proceeds actually come into his hands. For anything before that, whether it consisted in representations made by Cochran, or alleged negligence in not receiving the proceeds in the proper way from the Board of Revenue, the sureties would not be liable for as to those things the sureties have not contracted to be liable. As to all such matters the surety may properly say—I have contracted to be liable for Cochran only as to the safekeeping and proper disbursement of those proceeds after they have actually come into Cochran's hands ; anything before that my contract does not cover.

II.

The loss to the county was occasioned solely by the non-performance of its duties by the Board of Revenue.

We have seen that it was the duty of the Board of Revenue to collect the proceeds of the sale of the bonds from the purchaser and pay over these proceeds to the treasurer. Did the Board of Revenue perform its duty under the Act? It did not. When a public officer in Alabama is authorized or required to collect money, he is not allowed to collect anything but money in its primary sense, *e. g.*, coin and paper money issued by the United States Government or a National Bank ; in other words, money in the sense that when paid over to a treasurer it can be kept by him in his safe in its integral form without change. THIS IS THE DISTINCTIVE ALABAMA LAW. What did the Board of Revenue do? Instead of exacting actual money from

Josiah Morris & Company, the purchasers of the bonds, it took their check drawn on themselves; in other words, in legal contemplation, their promissory note. If they had exacted actual money, Josiah Morris & Company would never have gotten the bonds, as they did not have the actual money to pay for them. THIS WAS THE ACT WHICH CAUSED ALL THE LOSS, for Josiah Morris & Company were insolvent and defrauded the Board of Revenue, and through it, the county of Montgomery, by giving it their worthless note in payment for the bonds. It is true that in other jurisdictions money has a broader meaning. In commercial usage and in business transactions, it is often used in a large generic sense, as meaning any circulating medium, or instruments or tokens in general use in the commercial world as the representatives of value, such as certificates of deposit and checks. But all such instruments need to be collected or cashed before actual money is received. When the term is used in an Act of the Legislature, it becomes necessary to interpret the Act. An Alabama Act is to be construed with reference to the fixed and settled Alabama law as determined by the decisions of its Supreme Court.

By these decisions it is incontrovertible that public officers are to be paid in *actual* as distinguished from *representative* money.

West vs. Bull, 12 Ala. 340.
Alston vs. State, 92 Ala. 124.
State vs. Houston, 83 Ala. 361 : 78 Ala. 576.
Bibb vs. Snodgrass, 97 Ala. 459.
Powell vs. Henry, 27 Ala. 612.

We shall see that the complaint is founded upon this distinction.

The Circuit Court of Appeals misconceived the relation of the parties. That Court dealt with the question as if the treasurer were guilty of a great wrong bringing loss to the county and trying to escape liability by reason of a

technical defence. Precisely the contrary is the truth. When the Board of Revenue of Montgomery county issued the bonds, they sold them to Josiah Morris & Company. Josiah Morris & Company bought the bonds when they knew they were insolvent, and gave in payment a check drawn by themselves on themselves; in other words their promissory note. HERE WAS THE REAL FRAUD. Josiah Morris & Company swindled the Board of Revenue out of their bonds by giving it a worthless note. The treasurer was innocent of any wrong in this purchase, his only duty being to hold safely what was received by the Board of Revenue from this sale. It seems therefore a great hardship to make the sureties on the treasurer's bond pay the proceeds of these bonds when the treasurer never received anything in his possession that was worth anything. By the opinion of the Circuit Court of Appeals, the treasurer, though innocent, is made to pay, through his bondsmen, for the fraud of Josiah Morris & Co., and that too, when the thing which he received was turned over to him by the *Board of Revenue*, which in this matter, by the express directions of the Legislature, represented the county of Montgomery itself. In effect, the Court says:

> Although I took this check for the bonds and turned it over to you as my treasurer to safely keep it, yet I will make you pay for it even though it was worthless when I gave it to you.

Evidently the sureties on the bond have a right to scan critically the principles of law by which such an unjust liability is sought to be imposed on them.

III.

The Treasurer violated no duty as to this special fund for which the sureties on the bond can be held liable.

(1) We have seen that the only duty imposed upon the Treasurer by this special Act was—*to safely keep all the pro-*

ceeds accruing from the sale of the bonds which may come into his hands in his official capacity the same as for other county funds or moneys in his hands as such treasurer.

The Act contemplated that the *Board of Revenue* would do its duty and the treasurer's liability was fixed by the act upon the assumption that the Board would do its duty. If the Board of Revenue had done its duty, it would have collected *actual money* and paid over this actual money to the treasurer. There the duty of the treasurer under the act first arises. That duty is to *safely keep* this actual money thus received in his official capacity. What does this involve under the Alabama law? Safely keeping it by the law of Alabama means that he must keep it in the exact form in which he got it. He should put it in a safe, or make a special deposit of it in a safe deposit box so that the identity of the very coin and bills should be preserved. It is in this respect that the law of Alabama differs from the law in other jurisdictions. As a corrolary from this it is wrong for a treasurer in Alabama to make a general deposit of money in a bank, for this is construed to be an unlawful lending of the actual money of the county to the depository bank and is a conversion of the money and a criminal offence. It is hard for us to realize in these days when nearly all financiering is done by bank credits that there is a State in which the law requires public officers to have actual money, which insists upon their holding it in its identity just as received, and which not only denies to them the conveniences of bank deposits, but makes any general deposit in bank criminal; but such is conceded to be the law of Alabama, and it is the ignoring of this law by the Circuit Court of Appeals that we are complaining about.

When a treasurer in Alabama does make a general deposit of *actual money* in a bank he and his bond may be sued for a conversion of it. Why? Because the treasurer had actual money, but now he has handed that actual money over to a bank and taken the bank's credit in the form of a deposit

account. There cannot be a conversion by making a general deposit unless the depositor deposits actual money. *The very essence of the conversion consists in changing actual money into a credit.* In all the counts of the complaint except the *sixth* and *eighth*, which we will refer to presently, the treasurer is accused of converting money into a bank credit, by making a general deposit in bank. That is the whole violation of duty charged. We answer, that under the Alabama law the treasurer had no right to convert actual money into a bank credit, but it is clear on the facts that he did not do this. *He never received actual money;* and therefore he was and could not be guilty of converting it.

(2) The *Board of Revenue* instead of collecting *money*, took the promissory note of Josiah Morris & Company for the bonds and turned over this note to the treasurer. This was not the proceeds of the bonds within the meaning of the Alabama law, as it was not money. Not being money, it was a thing which by its very nature could not be *safely kept* in its identical form by the treasurer. A demand note is not intended to be kept, but collected and turned into money, and in the very process of collection it must be surrendered to the promissor and not kept. The duty of the treasurer, therefore, as to this special fund never began, and could not begin until he got into his hands something which he could *safely keep* in the very form in which he received it. This something is *actual money*, which he can safely keep in its identical form. We have already seen that there could not, by any possibility, be any conversion by a general deposit under the Alabama law, which is the wrong we are sued for, unless there was actual money in the hands of the depositor and by him deposited.

(3) This distinction is not a mere technicality but lies at the very root of the whole question of liability, both in law and justice. We do not know of any State, except the State of Alabama, in which the making of a general deposit of

county funds by a county treasurer is a wrong or a crime, or in which the county treasurer is obliged to keep actual money in its identical form as received. Therefore, in most other States, a suit like this could not be brought. The entire justice of the application of the principle in this case is apparent. Why should the treasurer and his surety pay for the loss? The thing taken by the Board of Revenue in payment for the bonds was a worthless note. This was their fault, as they should have insisted on taking money. They took it innocently, as they did not know that Josiah Morris & Co. were insolvent. But this taking by them of a note instead of money is the real cause of all the loss to the county. Why should the treasurer be held liable for a loss brought about by the county itself, through its *Board of Revenue?* He had nothing to do with the sale of the bonds or the collection of the proceeds. His duty was simply to *safely keep* the proceeds as handed over to him. He had no idea that Josiah Morris & Co. were insolvent, nor was he under any obligation to see to it that the Board of Revenue, his superior officers, received actual money. Why should he pay over $100,000 to the county in exchange for a worthless note the county handed over to him?

(4) The Circuit Court of Appeals in Montgomery County vs. Cochran, 121 Fed. Rep. 21, held that this check was money within the meaning of the Act.

The Court, in its opinion, says on page 21: "We think, therefore, that checks, or certificates of deposit received in good faith by the Board of Revenue and delivered to the treasurer, or delivered by the direction of the Board of Revenue to the treasurer, would be *funds or money* for the *proceeds of sale* of the bonds in the hands of the treasurer. But if this be so, was it not the duty of the treasurer to keep the check? The plain and explicit language of the statute is—'and the proceeds of said bonds shall be paid over to and kept by the treasurer of the county.' * * *

"Said County Treasurer to be responsible for the safe keeping of all the proceeds accruing from the sale of the bonds. If this Court decides the check to be funds or money, and proceeds of sale of the bonds, how is it possible to ignore the exact language of the statue that these proceeds shall be kept by the treasurer?" But the Court then goes on to say, page 22: "It was not his duty to keep the check but to have it cashed, and to keep the coin or notes received for the check * * * in his own safe, or on special deposit." This, we respectfully submit, is self-contradictory. It proceeds, or funds of money, under the statute, are coin or notes, as we contend, then we can understand why Cochran should keep the coin or notes. But, if the check is proceeds, or funds of money, then under the express terms of the statute, it should be kept by Cochran and moneys drawn on it only as directed from time to time by the Board of Revenue. The great injustice to the sureties in this case we respectfully urge is clearly shown by this construction of the statute. There would be no more difficulty in the treasurer keeping this paper in the form of a check, but in reality a promissory note, than in keeping a certificate of deposit or a bank deposit book containing an entry of deposit, its precise equivalent. Suppose he had kept it in his safe; the loss to the county would have been the same as it is now. The bank would have failed in the same way, and at the same time, as it really did. The deposit of the check and the taking of a bank credit would not change the situation. It would amount simply to taking one promise for another. So we have a case where if the check was funds or money, or proceeds of the sale of the bonds, the sureties are to be held liable for a loss, which precise loss would have occurred any how if the treasurer had done his entire duty by keep- the check.

(5) *The Circuit Court of Appeals erred in deciding that the check of Josiah Morris & Company, drawn by themselves, on themselves, was "funds or money" within the meaning of the Act.*

The Court decided that "the statute must be construed in the light of commercial usage and common knowlege of business transactions." This would be entirely correct if it were the law of Alabama. This is an Alabama statute which we are construing, and it needs no authority to show that an Alabama statute should be construed with reference to the fixed and settled Alabama law and policy as determined by the Alabama statutes and the decision of its Supreme Court.

Whether checks and certificates of deposit may be considered as money, or merely instrumentalities through which money may be secured, depends entirely upon the law and policy of the particular State whose statute is being construed. In a State where a public treasurer is obliged to retain the public funds in specie without change, and when general deposits in bank by him are unlawful, then checks and certificates of deposit *cannot* be considered as money or public funds. In other States, where such general deposits are lawful, and where a treasurer is considered as having funds in hand whenever he has a bank balance, then they may be considered as money or public funds.

Now, the Court has held that a check or certificate of deposit is "money or funds" in the hands of a public officer in Alabama, entirely ignoring the fixed law of Alabama—that general deposits are unlawful and that the treasurer must hold in specie that which he receives; and to support the proposition cites authorities from States where the contrary policy prevails. An examination of these cases will show that in them checks and certificates of deposit were held to be money or public funds precisely because general deposits were lawful.

The Court quotes upon this proposition—

State vs. McFetridge, 84 Wis. 473.
People vs. McKenney, 10 Mich. 55.
State vs. Hill, 47 Neb. 456.
Allibone vs. Ames, 9 S. Dak. 74.

Taylor vs. Robinson, 34 Fed. 681.
State vs. Krug, 12 Wash. 288.
Byron vs. Brandeth, 16 L. R. Eq. Cas. 475.
Bork vs. People, 16 Hun, 476.

Thus, in *State vs. McFetridge*, 20 L. R. A. 223, the whole question turned on whether the treasurer had the right to deposit in a bank by way of general deposit. The Court decided that he had, that such deposit was not unlawful and was not a loan.

The Court then asked the specific question (page 236):

"*Third.* Was Treasurer McFetridge required by law to keep in legal tender coin or currency all the public funds in his hands, as treasurer, in the vaults of the treasury? If so he could not, of course, lawfully make general deposits thereof in banks." The Court then go on to decide that he was under no such obligations, and that general deposits were lawful because any other construction would "ignore the customary and necessary processes universally employed in the conduct of business affairs," and that "money was a generic term and may mean * * * any instruments or tokens in general use in the commercial world as the representation of value." Hence the Court concluded that the Attorney-General and the Governor would find money in the "vault of the treasury" in Wisconsin, even if the sum was made up of certificates of deposit or bank credits by way of general deposits.

Now it is certain that this case cannot apply to Alabama; for if the treasurer in Alabama did not have money in his hands, but only certificates of deposit or a bank credit, he would be held to have converted the money and be guilty of embezzlement. We earnestly press this matter upon the attention of the Court and urge that they would not have relied upon this authority, which was not cited by either side, if they had called to mind the difference between Alabama and Wisconsin law. In Wisconsin a certificate of

deposit or bank credit is "money or funds" in the hands of a treasurer, because a general deposit is unlawful and a conversion.

In *People vs. McKinney*, 10 Mich. 54, receipts by a State treasurer of drafts drawn by a railroad company on a New York bank in payment of taxes, did not amount to money or payment of the taxes any further than money had been actually received by the treasurer upon said drafts.

In other words, *People vs. McKinney* simply covers the case of the actual checks drawn by Cochran on this road and bridge fund and paid, amounting to $5,769 (Record, 132), which was allowed in the trial below, and was not a part of the judgment.

In *State vs. Hill*, 47 Neb. 681, the distinction is sharply drawn in the opinion of the various judges who decided the case. There the question was whether a retiring treasurer could be held liable on his bond, when he had turned over to his successor certificates of deposit in a bank which afterwards failed, instead of money. The whole question turned on the validity of general deposits. A statute had been passed, authorizing general deposits, but only after the retiring treasurer had gone out of office. All the judges conceded that if general deposits were unlawful, the certificates of deposit would not be money, and the payment not a good payment. Post, C. J., held general deposits to be lawful in Nebraska, and not loans or investments (pages 532-4); but Justice Norval, who held the deposit to be unlawful, strongly states the inevitable conclusion therefrom; quoting from Cedar Company vs. Jenal, 14 Nebraska, 254, he decides that prior to the taking effect of the legislative enactment providing for the depositing of State and county bonds in bank, the payment of money in the hands of a State or county treasurer, at the termination of his term of office, to his successor, could be effectuated alone by the payment of that which the law of the land recognized as money. The mere delivery and acceptance of certificates of

deposit issued by a bank, upon which no money had been realized, is not such a payment as will release the outgoing officer. (Pages 457; 506-11.)

The Court then goes on to declare the reason for this rule as follows:

> "It is clear that it is the duty of both State and County Treasurer to keep the money coming into their official custody in specie, except when by recent statutes they are permitted to invest or deposit it. * * * Hill's duty was to keep the money in the treasury at Lincoln. He had no right to invest the money or to deposit it. * * * When Hill removed the money from the treasurer's office with the intent of depositing it contrary to law, he was guilty of a conversion and a cause of action accrued." (Page 509).

Here is a precise statement of the law just as it is in Alabama, and all the judges agreed that if that was the Nebraska law, then certificates of deposits would not be money or public funds; but the Chief Justice and the Judges who agreed with him, (from whom this Court makes its reference) held that in Nebraska a general deposit was lawful and not a conversion, and for this reason a certificate of deposit would be money or public funds.

The Court also holds that although private individuals may by express contract receive certificates of deposit, etc., as money, a public officer who is merely the agent of the State could not bind the public by accepting anything which by the law of the land is not regarded as money. (Page 510).

In *State vs. Krug*, 12 Wash. 288, the same distinction is made. Krug was indicted for making profit from the public money in violation of a statute. He drew a check for $10,000 on the public bank account which was honored, from which he made a profit. This was money for two reasons: First, because the check was actually paid, and

second, in Washington if a treasurer has money in bank it is public money.

The Court say, (Page 308):

> "The treasurer by law is made responsible for all moneys which come into his possession. He is the custodian of these moneys. He can keep them in a safe under his personal inspection and jurisdiction, or he *can deposit them in the bank* (italics ours); but whether kept in a personal safe or *deposited in bank*, they are still to all intents and purposes the funds of the city."

Now in Alabama, the funds deposited in bank would not be the funds of the county, but would belong to the bank; and it is just because the title is transferred to the bank that the funds are said to have been converted by the treasurer.

In *Allibone vs. Ames*, 9 S. Dak. 74, the case turned on the same point. General deposits were lawful. The bank in question was the regular depository for public funds, designated by the county treasurer, and therefore certificates of deposits were held to be public funds.

The other cases cited really throw no light on the question. The question we are considering is, whether a check can be regarded as "money or funds" in payment to a public officer for a sale of bonds.

In *Taylor vs. Robinson*, 34 Fed. Rep. 678, decided by Judge McCormick, a sheriff in Texas was sought to be enjoined from collecting taxes on State lands which the plaintiff held under a contract of purchase, and only by way of illustration in an argument on this question was a definition of "money" given in its general sense.

The case, of course, has no application in a State which requires a public officer to hold and keep public money in specie, the integral thing which he receives.

Byron vs. Brandeth, 16 L. R. Eq. Cas. 475, is only a construction of the word "money" as used in a will.

Bork vs. People, 16 Hun, 476, was a case on the sufficiency of an indictment for embezzlement by a treasurer of Buffalo, N. Y. A general description was held sufficient, because "the funds which the treasurer is alleged to have embezzled in the present case may have been a *mere credit in a bank*, and not money at all." (Page 479.)

This could not be law in Alabama. An embezzlement could be committed by depositing money in bank, but after it is once in bank it could no longer be embezzled as the money of the county.

Carr vs. State, 104 Ala. 43.

So that the Court will perceive that all these authorities cited by the Circuit Court of Appeals in its opinion, failed to establish the proposition for which they are cited. They do establish the proposition that checks and certificates of deposit may be treated as money or public funds in States where general deposits are lawful. They do not establish the proposition that they can be regarded as "money or public funds" in States where general deposits are unlawful, but, on the contrary, support the contention of these petitioners.

Now it is absolutely settled in Alabama by a uniform current of authority that—

General deposits are unlawful.

Alston vs. State, 92 Ala. 124.

A public officer must retain funds in specie as he gets them.

Alston vs. State, 92 Ala. 124.
State vs. Houston, 83 Ala. 361.
State vs. Houston, 78 Ala. 576.

And that checks and notes or certificates of deposit are not money, and can never be regarded as payment of an obligation, unless there is an express contract to that effect

entered into between persons authorized to make such contract.

Bibb vs. Snodgrass, 97 Ala. 459.
Chapman vs. Cowles, 41 Ala. 103.
West vs. Bull, 12 Ala. 340.

In Chapman vs. Cowles, 41 Ala. 113, it is said:

> "West vs. Bull, 12 Ala. 340, is to be taken as authority upon the meaning of the words money and cash used in the other cases cited from the reports of this State."

"A bill of exchange is presumptively received not as payment of the debt, but only as a means of raising funds to be applied as a payment when realized."

Whiteley vs. Durham, 89 Ala. 493.
McWilliams vs. Philips, 71 Ala. 80, 82.
Fickling vs. Brewer, 38 Ala. 685.
Shackelford vs. Cunningham, 41 Ala. 203.
Loewenstein vs. Bresler, 109 Ala. 326.
Steiner vs. Jeffries, 118 Ala. 573.
Patrick vs. Pitty, 83 Ala. 420.
Carpenter vs. Murphree, 49 Ala. 84.
Day vs. Thompson, 65 Ala. 269.
Loan Co. vs. Stickey, 108 Ala. 146.
Lee vs. Green, 83 Ala. 491.
Lane vs. Jones, 79 Ala. 156.
Myatts vs. Bell, 41 Ala. 222.
Marshall vs. Marshall, 42 Ala. 149.
Kell vs. Larkin, 72 Ala. 493.
Dorrance vs. Jones, 27 Ala. 630.
Powell vs. Henry, 27 Ala. 612.

So that, in conclusion, we earnestly contend that the check of Josiah Morris & Company is not "money or public funds" under the Alabama law. There is nothing

in the Alabama policy, statutes or authorities which countenances such a proposition.

(6) It seems clear therefore that no duty could arise under the special Act, nor could there be any possibility of a conversion by general deposit, unless and until the Treasurer received actual money and the note or check given to him by the Board of Revenue, was not actual money.

But it is urged that after receiving the check he deposited it in the Bank of Josiah Morris & Company and the effect of this deposit and taking of a bank credit was to put actual money in his hands susceptible of conversion by a general deposit.

The Circuit Court of Appeals, 121 Fed. 22, decided upon this act of the Treasurer, page 22, as follows:

> "When the check was presented at the bank and accepted by crediting the amount to the treasurer, the effect in law of the transaction was the same as if the amount of the check had been handed to the treasurer, and by him returned to the bank."

This proposition is true in cases where it is applicable, but we respectfully urge it is not applicable in a case like the present, because—

(*a*) It ignores the special law of Alabama, to which the opinion makes no reference, that a general deposit of this amount is a felony, and that no civil rights can be created thereby.

Alabama Code, vol. 2, secs. 406-8.

As stated by Judge Jones in the Circuit Court:

> "The transaction, however, was not lawful. In view of the amount involved, it constituted a felony. The law requires the Court to ignore the transaction; to deny to it effect; to treat it as though it never happened, and decline to enforce any claim which must

rest upon the validity of the transaction. If the Court should undertake, out of this unlawful transaction, to coin money and put it in Cochran's pocket as treasurer, in order to hold the sureties accountable as for a conversion, it would violate the law of the land as plainly as any private citizen who undertakes, without authority of law, to make money out of that which is not money. In both instances the money would be counterfeit. That would be invoking a fiction of the law to put burdens upon the sureties contrary to all rules of law for measuring their liabilities, and in defiance of the law of the land."

And again:

"Most assuredly this result is an effort of the county to get the benefit of an illegal contract, and to enforce it as legal in order to get money out of its agent or representative, who, in fact, received no money. The county relies on a fiction of law which cannot be raised, as it involves enforcing as good and binding that which the law declares odious and unlawful."

(*b*) It ignores the real question in dispute. The real question is whether Cochran converted public money by a general deposit. If the check is the thing that was converted, then there was no damage, as the bank credit received therefor was of equal value. If the check was not the thing that was converted, but money, what money? There was no real money in Cochran's hands, and how could money get presumptively, or by fiction of law, in his hands for purposes of conversion by the very act relied on as a conversion? By what magic is money in the hands of Cochran for bank deposit? There must first be money in his hands, and then a conversion of it by general deposit. In other words, before he begins to make the deposit, there must be money which is about to be converted by a general deposit. We respectfully urge that authorities which decide that a check

due by the drawer of a check to the payee is discharged by the deposit by the payee of a check in bank just as if money had been paid, can have no possible application to the present case, which depends—at least this branch of it—on the allegation of the conversion of the money by a general deposit.

(*c*) It ignores the insolvency of the bank. This is not a case where actual money or even a check on another bank, which is collectible, is deposited by a public officer in a bank which afterwards fails, where by all the authorities a public officer, and his sureties, are held liable; but it is a case where the thing deposited in bank is the bank's own note and where the bank was insolvent at the time the note was given. There is no authority anywhere which holds that the deposit of a bank's own check in the same bank is equivalent to a deposit of money if there is no money in the bank at the time of the deposit to meet it. Suppose a bank to be utterly insolvent, not able to pay five cents on the dollar, could anyone contend that a deposit of its own note would be equivalent to money? The theory of such cases is that if the check had not been deposited it would have been paid on demand and the money deposited, but if there is no money there to pay the check with, then the fiction of law does not apply. In the particular case at bar the note was $111,109.58. There was only $35,000 in the bank on the date of its being given and on the date of its deposit. (Record, pages 112-113.) The bank publicly failed in about two weeks, and when its assets were all collected and distributed it paid only 25 cents on the dollar, and the county of Montgomery received on this note the sum of $26,000, which has been deducted from the claim sued for, so that the note, to the extent of the claim sued for, was utterly valuless.

(*d*) It would be, moreover, unjust to apply the fiction above referred to, as against the sureties on the bond.

The difference between the deposit of money and the deposit of a note, or check, which is not paid, has the greatest possible effect on the rights of the surety to the funds of the insolvent bank. Josiah Morris & Company knew in this case that county funds were being deposited, and that the deposit was contrary to the law. Under these circumstances, the deposit is a trust fund, which gives the sureties a preference over the general creditors of the bank.

Myers vs. Board of Education, 51 Kan. 87.
San Diego Co. vs. The Bank, 52 Fed. Rep. 59.
Davis vs. Elmira Savings Bank, 161 U. S. 289.
Frelinghuysen vs. Nugent, 36 Fed. Rep. 239.
Brown Co. vs. Latimer, 36 Fed. Rep. 62.

But this principle only applies when the assets of the bank have been actually augmented by a deposit.

Richardson vs. New Orleans Co., 43 C. C. A. 583.
Richardson vs. New Orleans Deb. Co., 42 C. C. A. 619.

Here the county is trying to hold the sureties upon the theory that actual money was converted by the treasurer by a general depesit, which was wrong to the knowledge of the bank. If this were the case, and the sureties were held liable, they would have a priority over all the general creditors of the bank, and could probably get their money back. The county then proves a case which shows that no actual money was deposited by the creditor, and that the bank's assets were not increased one cent by the deposit of the check or note, but seeks to supplement their proof by a fiction of law that the deposit shall be regarded as money. This might be just if the fiction worked in favor of the sureties as well as in the favor of the county.

But the contention is that the fiction shall be held just long enough to hold the sureties liable, and then dropped as soon as the sureties attempt to enforce their rights in indemnity against the county.

But the crowning injustice lies in the attempt of the county to saddle its own negligence upon the treasurer. The county, through its Board of Revenue, has lost this money by not performing its duty of collecting it, and this, of course, puts them in an inconsistent position. They are obliged to rely upon the one theory, to wit, the general deposit, in two contradictory aspects. In order to succeed, they must first rely on the general deposit being a conversion or crime, in order to have a cause of action, and at the same time to rely upon it as a valid contract in order to prove that the treasurer had money in his hands. In other words, the general deposit must be both wrong and right in order that this extraordinary cause of action may be maintained.

The case was decided against the defendants upon the ground that the check of Josiah Morris & Company was money; that Cochran converted it by making a general deposit, and that as matter of law it was worth its face value.

IV.

No Liability by Reason of Estoppel.

We have seen that the duty of the treasurer arose only when he received actual money. Before this time he had no duties with reference to this special road and bridge fund. Therefore, if before this time, he made any representations with reference to this fund, the effect of which was that the county lost its bonds, the sureties on the treasurer's bond would not be liable. As to all such alleged wrongs on the part of the treasurer, before he received actual money, the sureties may well plead *non in haec foedera venerunt.*

But there is no estoppel on the admitted facts of the case. Count six (6) of the complaint alleged that the bonds were delivered by the Court to Cochran by virtue of a false representation made by him that money had been actually received by the treasurer. (Record, page 29.)

Let us understand precisely what is meant by this alleged breach of the bond in the sixth (6th) count of the complaint.

1. That Kohn did pretend and represent to Allen that the sum of $111,109.58, the purchase price of the bonds, had been paid to the treasurer.

2. That this representation was false, inasmuch as no part of said money was paid to the treasurer or the plaintiff.

3. And by virtue of this false pretense the treasurer, through Kohn, his agent, caused the delivery of bonds to the bank.

What is meant here by the pretense that the sum of $111,109.58 was paid to the treasurer? Does it mean that it was pretended that a check was given to the treasurer, or that he secured a bank credit by its deposit? It cannot mean this for two conclusive reasons: (a) Allen knew that a check had been given to the treasurer, for he gave it to Kohn, as agent for the treasurer, himself. And he also thought it had been deposited (Record, 116.) He was not deceived by either of these things because he knew them both; (b) but still more conclusively, the pretense charged in this count was a *false pretense.* The charge is that he pretended and represented that the sum of $111,109.58 was received, whereas in truth and in fact it was not received. It is only by virtue of the falsity of the pretense that an estoppel is created at all. There can be no estoppel if the alleged pretense is in fact true. It would be a misnomer to call a true statement a pretense. Now by the uncontradicted evidence it was *true* that Cochran did receive a check, and did get a bank credit thereon. Therefore the statement that he pretended to have received $111,109.58 means something other than that he received this sum as a check or bank deposit. It must necessarily mean that he received this sum in *actual money,* for in this sense alone, under the facts, could it be regarded as a pretense or representation which was not true, and, therefore an estoppel, if, by virtue thereof, the bonds

were parted with. The real question, therefore, is—did Allen part with the bonds in the belief that Cochran had collected actual money, and was that belief brought about by representation by Cochran or his agent Kohn?

The facts are few and undisputed, and are found on pages 109-117 of the Record, to which the Court is respectfully referred.

(*a*) Does this testimony tend to show that Allen was induced to part with the bonds under the belief created by anything said or done at and about the time of the delivery of the bonds, that the check had been collected in actual money?

We affirm that it does not.

It must be shown not only that the representations made by Kohn, either by words or acts, were calculated to make Allen believe that the check had been collected in actual money, but that they did actually create such belief.

Now it positively and expressly appears from the testimony of Allen himself that he had no such belief. He expressly says he thought the bank was solvent, that the check was good, and he thought, when the receipt was given him and the bonds delivered on the faith of it, that the check had been deposited in bank. No one pretends that Cochran, through Kohn as his agent, represented the check to be good or the bank solvent; and such is not the alleged pretense relied upon in the complaint. Kohn did do acts as Cochran's agent from which Allen had the right to infer that Cochran deposited the check in bank. So that it can be said that Cochran represented to Allen that the check had been deposited in bank. But this representation was true, it was not a false pretense, and, therefore, could not be the foundation of an estoppel. Nowhere does Allen say, on reasonable or unreasonable grounds, that he thought Cochran had collected actual money on the check, nor that Cochran so represented; and this is the only belief, and the only representation which, as we have seen, could have been the

foundation of an estoppel. On the contrary, so far was Allen from being effectively induced to part with the bonds upon any representation that actual money had been collected on the check, that he was not induced to part with the bonds even by the implied representation that the check had been deposited, for he expressly says *that if Kohn had brought the receipt at the same time as he brought the check he would have given him the bonds.* What does this mean? It means, and this is conclusive on this branch of the case, that all that Allen wanted was a voucher in his office to represent the bonds delivered, as required by the law of Alabama in reference to county expenditures; for since he would have given the bonds if the receipt and check had been brought together, and since if the check and the receipt had been brought together and passed over for the bonds, the check could not at that time have been either deposited or collected, it follows as a necessary and absolute conclusion, that the giving of the bonds, in Allen's mind, was not dependent upon either the deposit or the cashing of the check.

If, therefore, Allen was not, as a matter of fact, induced to deliver the bonds by any false representation that the check had been collected in actual money, how does it become material to discuss the acts and words of Kohn from which such a representation might possibly be inferred?

Even if we should admit *ex argumenti gratia,* that such a representation might, by possibility, be inferred from the acts and words of Kohn, the complete answer is that it had no effect on Allen and was not in any way the inducing cause for the delivery of the bonds.

The plaintiff claimed that the evidence showed an estoppel as matter of law.

The only thing it can rely on is the receipt. They argue that the receipt was conclusive as matter of law on the point that Cochran had received actual money.

Now we all know that bills are paid every day by check and the receipt given says: Received—so many dollars. A

receipt may therefore mean received actual money or money in its generic sense, such as a check. Again, the receipt in this case read—received from *the Board of Revenue*—and Allen knew that the only thing received from *the Board of Revenue* was a check. Again—the receipt stated—"received * * * $111,109.58, proceeds sale $100,000 bonds," and the Circuit Court of Appeals expressly held that the check was "the proceeds of the sale" of the bonds. So in this case it is evident, in the contemplation of both parties, the receipt meant that a check was received, and not actual money. Allen did not take the check and keep it, for he was not entitled to hold it. The treasurer was the proper custodian of the check, and that was the only reason Allen handed it back. Since he could not hold the check, and since he needed a receipt as a voucher for the delivery of the bonds he asked for a receipt, and for no other reason. Kohn would have given it to him then and there, or have written one on the spot, but for the fact that the receipts of the treasurer are numbered and kept in a blank book, and he had to go back to the bank, where he kept his office as attorney in fact for the treasurer and get the blank form of receipt from the book. As soon as he got it and filled it out he returned with it to Allen, and received the bonds upon delivering the receipt. When you add to this simple statement of the facts, the further fact that Allen did not believe, as matter of fact, that the money had been actually collected, it is idle to argue that the receipt constituted an estoppel as matter of law, and particularly an estoppel such as is claimed in the sixth count of the complaint.

V.

No liability on ground that Treasurer undertook the collection of the proceeds of the bonds and was negligent in this undertaking.

As we have already seen, the Treasurer had nothing to do with the collection of the proceeds of the sale of the bonds. This duty was imposed by the Act of 1900 on the Board of

Revenue. The Treasurer's sureties did not agree to be bound by anything that he might do before he received the actual proceeds. This has already been fully discussed.

The eighth count of the complaint alleged that Cochran undertook to collect the proceeds of the bonds, and knowingly and wrongfully failed to receive the same. (Record, page 34.)

This count charges no liability if the treasurer's duty under his bond did not begin until he received the actual proceeds.

But even though the Court should find the duty resting upon the treasurer to collect from the Board of Revenue proceeds of these bonds, wherein was there negligence in such a way as to hold the bond liable? The county must take the position that the treasurer is under the obligation of deciding at his peril before he took the proceeds from the Board of Revenue, whether they were proceeds the law allows the Board of Revenue to receive or not. In other words, the Board of Revenue took the check of Josiah Morris & Company in payment of the bonds, and handed this check to the treasurer. Now, does the duty of receiving and collecting by the treasurer involve the duty of passing correctly upon the legal question as to whether that check was proceeds of the bonds, which the Board of Revenue was authorized to receive? If the Board of Revenue took the check honestly and in good faith, and the treasurer took it from them honestly and in good faith, because they handed it to him, is the treasurer to be liable for a breach of duty because his superior officers, the Board of Revenue, should not have received the same, and he should have declined to receive it from them?

Is not this an enormous constructive liability to put upon the official bond? By this construction, the treasurer's bond is to be liable for a mistake, on a point of law, made by his superior officers on a matter with respect to which he had nothing to do except to receive what they turned over to

him. There is no pretence that either Cochran, or the Board of Revenue, knew or had the slightest suspicion that the check was worthless, or the bank insolvent. If it is assumed to be a part of the duty of Cochran to receive money as the proceeds of these bonds, and if it is further assumed that that this duty devolves upon the sureties, the most that could be said is that this duty was not performed in receiving the check, but this would not make the bond liable. This is not the negligent performance of an official duty. It is the doing something which the treasurer had no right to do, was *ultra vires*, and therefore not an official act within the meaning of the law.

This was decided in the case of State vs. Hill, 47 Neb. 522. In that case the majority of the Court held that in Nebraska certificates of deposit were money, and therefore a retiring treasurer relieved his bond by paying them over to his successor. But the chief justice discusses also the effect on the sureties of the bond of the succeeding treasurer, of his receipt of those certificates of deposit if they were not money, and therefore something which the succeeding treasurer was not authorized by law to receive. He says, page 522:

> "I must not, however, be understood as holding that the power of an officer to bind his sureties or the public in receipting for public moneys, is without limitation. It is conceded, by way of illustration, that by no mere barter between Hill (outgoing treasurer) and Bartley (succeeding treasurer) could the latter have charged his sureties as for money received, or the former have relieved himself from liability upon his bond. Such a transaction is confessedly *ultra vires* and ineffectual for the purpose of concluding either the State or the sureties of one incoming treasurer."

What was *ultra vires* in this case? The taking of a chattel or chose in action for money?

This principle is of general application, and is especially settled in Alabama.

Thus, payment to a sheriff after the return day of the execution does not constitute money in his hands, and his bond is not liable for failure to pay it over. Why? Because he has no authority to receive it. The same argument might be made there as here, that it was a negligent performance of the duty of receiving according to law, and the money was received by the sheriff in color of his office. But the Court held the bond not liable.

Fitzpatrick vs. Branch Bank, 14 Ala. 533.

In a sale of goods made by a sheriff, without order of Court, but by consent of parties, did not make the sheriff's bond liable for the proceeds of sale, for he was regarded in the sale as the agent of the parties.

Governor vs. Perrine, 23 Ala. 807.

So in this case everything done by Cochran prior to the actual receipt of money which he was to safely keep was done by him not as an official, but as the agent *pro hac vice* of the Board of Revenue, as it was their duty to collect and pay over money, or the proceeds of the sale.

Morrow vs. Wood, 56 Ala. 1.

Even if negligence in receiving the check would be relied on, there could be no liability unless that negligence caused the damage.

Savage vs. Matthews, 98 Ala. 535.

We have already discussed this proposition under the head of estoppel, and from that discussion it is clear, from the evidence the Board of Revenue were not unwilling to receive the check in payment of the bonds, *nor were they unwilling* to hand over the bonds on the presentation of the check. In other words, there is nothing in the evidence from which the Court has the right to assume that the Board of

Revenue were led to believe before handing over the bonds that actual money had been received by the Treasurer.

VI.

If the check is proceeds of the bonds the treasurer liable only for its real value.

The Circuit Court of Appeals held that under the special statute, the check given by Josiah Morris & Company, and turned over to the treasurer, was "funds, money or the proceeds of sale," within the meaning of the Act of 1900, and the Court goes on to decide that "it was not the treasurer's duty to keep the check, but to have it cashed, to keep the coin or notes received on the check. In doing this he should conform to the law of the State to keep the coin or notes under his actual personal control, as, for example, in his own safe, or on special deposit."

If that position is well taken, it follows that the treasurer violated no duty in receiving the check, and from that point of view, there could be no liability under the eighth count for wrongfully and knowingly failing to the receive the purchase price of the bonds from the Board of Revenue.

Having, therefore, received the check, according to this theory, his duty was to collect it in actual money. Being innocently and rightfully in possession of the check, and his only duty being to collect it from the bank, what is the measure of damages for the failure to collect? Evidently, what the check was worth. But what was it worth? Counsel for Montgomery county say it was worth its face value, to wit, $111,109.58 in actual money as matter of law, and contended that all evidence to show the financial condition of the bank at that time was inadmissible. But what brought about this curious notion, so much at variance with the real facts in the case? Simply and entirely a misapprehension of the meaning of the word "money." They contend that because the Circuit Court of Appeals declared that the check in Cochran's hands was money in his hands, that they thereby meant actual money. They lose sight of the fact that the Circuit Court

of Appeals used the word "money" in two senses, and carefully distinguished between them. That they held the check to be money only in its broad, generic, mercantile sense, and it was Cochran's duty to collect this mercantfle money by getting real money for it. Of course, mercantile money, such as checks, notes, &c., have value depending solely upon the amount of real money that can be collected on them. This is not only clear, but entirely just. Cochran received this check on the afternoon of January 8th, after banking hours. Suppose the bank had not opened its doors next morning, but gone immediately into insolvency, could it be held that Cochran could be responsible for the face value of the check? Evidently not, unless the Court is prepared to hold that though the Board of Revenue sold the bonds and received the check, thus completing the transaction, and though Cochran's plain duty was receive what the Board of Revenue handed him, still he, Cochran, in some occult way, was bound to guarantee to the county that the bank was solvent and the check collectible.

As to the value of the check, and its collectibility by the exercise of diligence, proof was offered showing that on the day of the deposit of the check, to wit, the 8th of January, there was only $35,000 in bank, and the bank failed and closed its doors on January 25th, seventeen days afterwards; that its assets were wound up, and after all the claims, including this check, were paid dividends, it appears that no assets were left. The value of this check was, therefore, the amount of dividends which were due on it from the insolvent estate. But even if this were not so, the sureties on the bond should certainly have been allowed to go to a jury on the question as to how much money could have been collected on the check in the exercise of diligence.

VII.

No Liability Under Color of Office.

We mention this briefly in order to exclude all possible suggestions of liability made by Montgomery county. It is

true, that under the Alabama Code, section 3087, a public officer is liable for acts done under color of office, but there is no liability in this case under that section, because—

(*a*) The special Act of 1900 in express terms applies only to the proceeds coming into the hands of the treasurer "in his official capacity," *e. g.*, by virtue of his office.

(*b*) Liability by color of office in Alabama refers only to cases where the officer arrogates an authority, and by virtue of this pretended authority tells third persons to do things that they are not really obliged to do. This principle never could have any application to a voluntary receipt by a treasurer, when he exercised no compunction or made no pretence of authority for requiring things of people.

Simmons vs. Hancock, 2 Ala. 728.
McElhaney vs. Gilleland, 30 Ala. 183.
McKee vs. Griffin, 66 Ala. 211.
Kelly vs. Moore, 61 Ala. 364.

So this principle can never apply when under no circumstances whatever could the thing be lawfully done. This is settled by all the authorities.

VIII.

The Circuit Court of Appeals, with great respect, has involved itself, in ignoring the special Alabama law, in contradictions which are evident on the face of its opinions.

1. The Court holds that the check of Josiah Morris & Company is "funds or money" or "the proceeds of the sale" of the bonds in the hands of the treasurer. If this is so, then by the express terms of the Act it would be the duty of Cochran to *safely keep it.* But the Court holds that though it is "funds or money" in his hands, it is not his duty to keep it, but to have it cashed and keep the cash or notes in conformity with the law of the State.

2. The Court holds that the check was "funds" or money or the "proceeds of sale" in the hands of the treasurer. If so, Cochran committed no wrong in receiving it. The giving of the receipt made no difference. A check does not *ipso facto* become money by the giving of a receipt, except upon the principle of estoppel which we have already discussed, and his sole duty, according to the opinion of the Court, was to collect it and turn it into cash. Now, although the Court holds his sole duty to have been to collect the check, yet it would not allow the defendant to prove the check to have been uncollectible even with the exercise of the utmost diligence.

3. The Court holds that the check is not money in the primary sense, but an instrument on which money was to be collected; but yet it holds as matter of law that the check is to be treated as worth its face value, entirely irrespective of the solvency of Josiah Morris & Company.

4. The Court in *Montgomery Co. vs. Cochran*, 126 Fed. Rep. page 460, states the effect of defendant's contention concerning the insolvency of the bank, as follows:

> "The contention of the defendant in error is, in effect that if the treasurer selects an insolvent bank from which could be collected only 25 cents on the dollar, in which to make the deposit, and the whole fund is lost, he is liable for only one fourth of it; and, of course, applying the same principle, if the bank selected for the deposit is utterly worthless, the treasurer and the surety on his bond would incur no liability at all."

Now this is not at all the defendant's contention, and is entirely at variance even with the statement by the Court of defendant's position in 121 Fed. Rep. 22.

The defendants have never contended that if they deposited money in a bank which turned out to be insolvent, they would not be liable. Such liability has been settled every-

where. We are dealing here with the value of the thing which was deposited, which was not money, but a promissory note; not only a promissory note, but the note of the very bank in which the deposit was made. It is with respect to the value of this thing at the time it was received by the treasurer and deposited by him, that the insolvency of the maker of the note is pertinent. The Circuit Court of Appeals held that this note was "the proceeds of the bonds" and properly received by Cochran, and his duty was to collect it; but with all that, would not allow us to show that it was uncollectible. This is so different from the case of actual money, or a collectible check being deposited in a bank which afterwards turns out to be insolvent, that we must be permitted to express great surprise that the Court should have so completely misapprehended and misstated defendants' position.

5. The Court also holds that there was a conversion by general deposit, although conceding there was no money to convert until after the deposit had been made, which by fiction of law is supposed to have created the money.

IX.

The case of Alston vs. State, 92 Ala. 124, is not an authority for the defendant in error. There the suit was not for the conversion of money nor for negligence in its receipt. Alston had issued a license and was liable to the State for the license money whether he collected it or not. The Court, therefore, decided in effect that it was no defence to this absolute liability to show that the money had been paid by check, which was lost by deposit in an insolvent bank. There was no occasion in that case to go into the question whether the check was money or not. Whether it was one or the other made no difference.

The other two cases cited—United States Fidelity Company vs. Union Trust and Savings Company, 38 So. Rep. page 177, and the case of Parks vs. Bryant, *Ib.* —are both cases in which public officers received money by check, when it was their duty to collect the same, and the checks were good and collectible when received. The loss occurred by not collecting the money.

All these cases are radically different from the case at bar wherein the liability depends expressly upon the language of a special statute.

EDGAR H. GANS,
THOMAS A. WHELAN,
For Plaintiffs in Error.

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SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1904.

No. 37.

JOHN J. COCHRAN AND THE FIDELITY & DEPOSIT COMPANY OF MARYLAND,
Plaintiffs in Error,

vs.

THE COUNTY OF MONTGOMERY,
Defendant in Error.

ERROR TO THE CIRCUIT COURT OF APPEALS FOR FIFTH CIRCUIT.

Brief of

WILLIAM L. MARTIN, *for Defendant in Error,*
On Motion to Dismiss the Writ of Error.

SUPREME COURT OF THE UNITED STATES,

OCTOBER TERM, 1904.

No. 279.

JOHN J. COCHRAN AND THE FIDELITY & DEPOSIT COMPANY OF MARYLAND,
Plaintiffs in Error,

vs.

THE COUNTY OF MONTGOMERY,
Defendant in Error.

ERROR TO THE CIRCUIT COURT OF APPEALS FOR FIFTH CIRCUIT.

Brief of

WILLIAM L. MARTIN, *for Defendant in Error,*
On Motion to Dismiss the Writ of Error.

STATEMENT OF THE CASE.

This cause has been three times tried in the Circuit Court and three times in the Court of Appeals.—121 Fed. 17; 126 Fed. 456; 128 Fed. 1019. The suit was brought January 21, 1902, in the City Court of Montgomery, a State court, in the State of Alabama, by the County of Montgomery, one of the counties of the State of Alabama, against John J. Cochran, a citizen of said county and State, and The Fidelity & Deposit Company of Maryland, a corporation of the State of Maryland; said Cochran being the Treasurer of the plaintiff county and said Fidelity & Deposit Company of Maryland (hereinafter called the bond company) being the sole surety on the official bond of said Cochran as such county treasurer; the purpose of the suit, as shown by the complaint, being the recovery of damages for

certain alleged breaches of said official bond. The bond is payable, conditioned and approved in all respects as provided by the statute law of Alabama, and it is in the penal sum of $120,000.

The complaint as filed in the State court and as it stood at the time of the removal of the cause to the Federal court contained five counts (pp. 5-12) each count showing the official character of Cochran, the due execution of the bond, setting it out, and charging as a breach thereof the conversion by Cochran of certain specified sums of money belonging to the plaintiff county and which came into Cochran's hands as county treasurer, by making a general deposit thereof to his credit in a certain named bank whereby the money was lost to the plaintff, and claiming damages in the sum of $120,000. The fourth count (pp. 8-10) went into deails as to certain amounts belonging to the general fund of the county and deposited and lost as aforesaid. The fifth count, after showing the official character of Cochran, the execution of the bond, etc., shows the appointment by Cochran of one John P. Kohn, of the banking house of Josiah Morris & Company, as Cochran's deputy with full authority to transact all the business of the treasurer; the sale by the county board of revenue of $100,000 of county bonds, (issued under an act of the Legislature to raise a fund for building county roads and bridges), to Josiah Morris & Company for $111,109.58; that said Kohn accepted their check and executed to the board of revenue a receipt for said sum, in the name of the treasurer, charged the amount upon the treasurer's cash book as so much money received by the treasurer on account of the road and bridge fund, and assigns as a breach of the bond (p. 12) that Cochran as such treasurer "did unlawfully and knowingly permit said John P. Kohn to make a general deposit of the money, the proceeds of the sale of said bonds, to-wit: the sum of $111,109.58, and all other money of the county of Montgomery amounting in the aggregate to the amount of one hundred and thirty thousand dollars, which came into his hands as treasurer as aforesaid, in the private bank of F. M. Billing, doing business under the name of Josiah Morris & Company, and after said deposit, the said John J. Cochran did knowingly and in violation of his official duty permit said F. M. Billing, doing business under the name of Josiah Morris & Company, to use and convert to his own use, all the proceeds of the sale of said bonds, as well as all other money of the county, which came into his hands as treasurer as aforesaid in the amount of of one

hundred and thirty thousand dollars," to the damage of the plaintiff as stated at the beginning of the count—one hundred and twenty thousand dollars.

Thus the complaint stood at the time of removal. Demurrers thereto had been severally filed by the defendants in the State Court.

Such being the status of the case, on the 15th day of February, 1902, The Fidelity & Deposit Company of Maryland presented to the District Judge of the United States for the Middle District of Alabama its petition for the removal of the cause into the Circuit Court of the United States for said district, the petition (pp. 1-4) alleging, among other things, that the matter in dispute exceeds the sum of two thousand dollars exclusive of interest and costs and "that the said controversy is between citizens of different States, in that the plaintiff was at the time of the commencement of said suit, and still is, a citizen of the State of Alabama; and your petitioner, The Fidelity & Deposit Company of Maryland, was at the time of the commencement of said suit, and still is, a citizen of the State of Maryland, and of no other State, having its principal office in the city of Baltimore, in the State of Maryland, and that your petitioner desires to remove this suit, which is now pending and undetermined in said State Court, before the trial thereof, into the Circuit Court of the United States, to be held in the Middle District of Alabama."

The petition then avers, "that from prejudice or local influence in favor of the plaintiff, and adverse to this defendant, it will not be able to obtain justice in said Court, or in any other State Court to which the defendant may, under the laws of this State, have the right to remove said cause, on account of said prejudice or local influence;" that the suit is against John J. Cochran, the treasurer of said county, and petitioner, a surety company and a surety on the official bond of said Cochran as such treasurer, to recover the sum of one hundred and twenty thousand dollars, the full penalty of the bond, "alleged to have been deposited by the said John J. Cochran, as such county treasurer, in the banking house of Josiah Morris & Company, of Montgomery, Alabama, whereby the said sum is alleged to have been lost to the said County of Montgomery by reason of the failure and insolvency of the said Josiah Morris & Company; and that by reason of the nature of said suit, all the residents and citizens of said Montgomery County have a direct interest in the recovery by the said plaintiff of the amount claimed."

The petition further alleges that John J. Cochran "is practically financially irresponsible, in that his assets, your petitioner is informed and believes, and so states, are less than five thousand dollars, and that the said Cochran is, therefore, practically only a nominal party to the suit, and that your said petitioner, the said Fidelity & Deposit Company of Maryland, would be obliged to meet practically the whole claim should the judgment be rendered against the defendants," and that statements have been made in the public press and circulated throughout the State "to the effect that your petitioner is and will be held liable for the amount claimed in said suit, and will have to pay the same," whereby a local prejudice was created and exists against petitioner and in favor of the plaintiff throughout the whole of the State of Alabama; that the fund in controversy constitutes practically all the funds of the plaintiff county and its inability to use such funds for public purposes has caused a feeling of prejudice against petitioner throughout the State; that the petitioner "is the surety on the bonds of many State and County officials throughout the whole State of Alabama, and that the decision in the present case will be regarded as probably constituting a precedent in any future case or cases which may be brought against your petitioner on said bonds, by reason of which there will necessarily exist a local prejudice against your petitioner in this case in any county of the State of Alabama in which said case should be tried."

The petitioner then shows that at the time of the failure of said banking house it was largely indebted; that it procured an agreement of extension from its creditors which it failed to carry out resulting in great disappointment and dissatisfaction to its creditors, and that this suit has been in some way intermingled with the affairs of said banking house in the minds of the people and in the supposed identity of the interests of the said Josiah Morris & Company and petitioner and that consequently there exists local prejudice in any State court in which said cause could be tried.

Upon the filing of the petition the District Judge made an order (pp. 16-17) reciting the fact of the filing of the petition "and it appearing to this Court that from local prejudice or local influence, The Fidelity & Deposit Company will not be able to obtain justice in said City Court of Montgomery, or in any other State Court to which the said The Fidelity & Deposit Company may, under the laws of the State of Alabama, have the right, on account of said prejudice or local influence, to remove said cause; and whereas this Court is of the opinion that

said cause should be removed to this Court upon the execution by the petitioner of a bond in the penalty of one thousand dollars," etc., which bond, the order recites, has been given and approved, and proceeds: "Now therefore, it is ordered, adjudged and decreed by the Circuit Court of the United States for the Middle District of Alabama, that the above stated cause be and the same is hereby removed from the said City Court of Montgomery of the State of Alabama, into the said Circuit Court of the United States for the Middle District of Alabama." Then follows an order in reference to transcripts.

The cause first came on to be heard in the Circuit Court at the May Term thereof 1902, when the plaintiff moved to remand to the State Court upon the ground that the Federal court was without jurisdiction—one of the defendants being a citizen of the same State as the plaintiff. The court overruled this motion.—116 Fed. 985. Upon this trial the plaintiff amended the complaint by adding four additional counts— to which the court sustained demurrers severally interposed by the defendants,—121 Fed. 17,—and the cause was tried upon the original complaint and the general issue and certain special pleas interposed by the defendants. The result was a judgment in favor of the plaintiff for the amount of the general fund converted, amounting then to $32,221.80, principal, and $4,648.12, interest thereon, making a total of $36,869.92.—121 Fed. 17. But under the rulings of the court upon that trial there was no recovery on account of the road and bridge fund. Upon writ of error sued out by the plaintiff county this judgment was reversed and a new trial ordered by the Court of Appeals.—121 Fed. 17. The amount of the general fund for which judgment had been rendered was, pending this writ of error, voluntarily paid by the bond company.

Upon the second trial in the Circuit Court, May 28, 1903, the plaintiff amended the complaint by striking out the fourth count and cerain portions of the fifth count (in parentheses p. 26) relating to the general fund, and by adding three new counts numbered 6, 7, and 8, these being the identical counts of that number which were before the Court of Appeals in 121 Fed. 17. The breach alleged in the 6th count (p. 20) is the representation by Cochran that the purchase money for the bonds had been paid to him as county treasurer whereby the board of revenue was induced to deliver the bonds to the purchaser with resultant liability to the county; the breach alleged in the 7th count (p. 32) being the deposit of the money in the bank whereby it was lost to the plaintiff, and the breach alleged in the 8th count

(p. 34) being the wrongful failure of Cochran to collect the proceeds of the bond sale.

There was no suggestion of any new claim in any of the added counts; but the facts were stated in greater detail, one of the amended counts (the 7th) showing, among other things, that the arrangement by which Cochran appointed Kohn his deputy and deposited the money of the county in the bank where Kohn was employed was known to the bond company when it became the surety of Cochran.

The second trial resulted in a judgment May 28, 1903, in favor of the plaintiff for $67,103.05, which was less than the amount claimed. Upon this judgment cross writs of error were sued out from the Circuit Court of Appeals and the judgment was reversed on the writ sued out by the plaintiff county and a new trial ordered.—126 Fed. 456.

The third trial, which was had in the Circuit Court February 3, 1904, resulted in a judgment in favor of the plaintiff county for $101,017.90, (pp. 102-104) being the full amount of the road and bridge fund converted by Cochran with interest thereon, less certain admitted payments made thereon by Cochran. This trial was had upon the plea of the general issue to the complaint, the latter being the same as, after amendment, upon the second trial. There was no plea of payment. The court sustained demurrers to certain special pleas interposed by the defendants. These special pleas merely suggested a line of defense already twice held untenable by the Court of Appeals, the leading thought of the pleas being that Cochran did not in fact receive the money for the bonds but only received "a worthless check." Upon this last judgment the defendants sued out a writ of error from the Court of Appeals and the judgment was affirmed.—128 Fed. 1018; Record, p. 150. And upon this judgment of the Circuit Court of Appeals the present writ of error is sued out by Cochran and the bond company.

The complaint—"the plaintiff's statement of his own claim"—contains no suggestion of any right claimed under the Constitution or laws of the United States, or any subject matter of Federal cognizance.

The right of action depended solely upon the law of the State of Alabama, as the following outline of the statutes will show:

Section 1428 of the Code of Alabama, 1896, provides that the county treasurer must, before entering upon the duties of his office, give bond in such sum as may be fixed by the court of county commissioners, "payable to the county, and conditioned as prescribed by law."

The condition prescribed by law is "faithfully to discharge the duties of such office during the time he continues therein, or discharges any of the duties thereof."—Code, Sec. 3070.

The bond is payable, conditioned and approved as prescribed by law.

Section 3087 declares the legal effect of official bonds as follows: "Every official bond is obligatory on the principal and sureties thereon—

"1. For any breach of the condition during the time the officer continues in office, or discharges any of the duties thereof.

"2. For the faithful discharge of any duties which may be required of such officer by any law passed subsequently to the execution of such bond, although no such condition is expressed therein.

"3. For the use and benefit of every person who is injured, as well by any wrongful act committed under color of his office, as by his failure to perform, or the improper or neglectful performance of those duties imposed by law."

Section 1429, prescribing the duties of the county treasurer, provides: "It is the duty of the county treasurer—

"1. To receive and keep the money of the county, and disburse the same according to law." . . .

Section 4 of the act authorizing the issue of the bonds, which act is set out in the record at page 106, made it the duty of the county treasurer to receive the proceeds of the sale of the road bridge bonds and disburse the same under the direction of the board of revenue, and provided that the county treasurer should "be responsible for the safe keeping of all the proceeds arising from the sale of said bonds, which may come into his hands in his official capacity, the same as for other county funds or money in his hands as such county treasurer."

By Section 4668 of the Code of Alabama, 1896, (Volume 2) certain officers, including the county treasurer, are prohibited, under criminal penalties, from knowingly converting to their own use or to the use of another, any of the revenue of the State or of any county thereof; and it is the settled law of Alabama that the deposit of public money in a bank by any such officer, to his credit individually or in his official capacity, amounts to a conversion of the money at the time of the deposit.—Alston v. State, 92 Ala. 124.

All of the statutes above referred to were in operation at the time the bond in suit was approved and became effective, except the act providing for the issue of the road and bridge bonds. That act was approved December 13, 1900.

Upon the last trial in the Circuit Court the jury returned a special verdict (p. 103) as follows: "We, the jury, find the issues in favor of the plaintiff, and if, in the opinion of the court, the plaintiff is entitled to interest on the amount of money converted from the time of the conversion, viz: January 8, 1901, we assess the damages of the plaintiff at one hundred and one thousand and seventeen dollars and ninety cents; but if, in the opinion of the court, the plaintiff is entitled to interest on the amount of money converted from the time of the bringing of this suit and not from the time of the conversion, we assess the damages of the plaintiff at ninety-two thousand dollars and forty-three cents; but if, in the opinion of the court, the plaintiff is entitled to no interest on the amount of money converted, we assess the damages of the plaintiff at seventy-eight thousand, four hundred and forty-four dollars and two cents."

Whereupon, the Circuit Court rendered judgment for the largest sum, and the Circuit Court of Appeals affirmed the judgment.

Such is the record now before the Court.

BRIEF.

"On every writ of error or appeal, the first and fundamental question is that of jurisdiction, first of this court, and then of the court from which the record comes."

Continental National Bank v. Buford, 191 U. S. 119, and cases cited.

The court is now concerned with the question of its own jurisdiction; but in order to determine that question it is necessary to ascertain the ground upon which the jurisdiction of the Circuit Court was invoked, and whether that jurisdiction was "dependent entirely upon the opposite parties to the suit or controversy being . . . citizens of different States." If that jurisdiction was so "dependent entirely," then the judgment of the Circuit Court of Appeals is final.

Act of March 3, 1891, c. 514, 26 Stat. 828, 1 U. S. Comp. (1901) p. 550.

What are the grounds of Circuit Court jurisdiction?

By Section 1 of the judiciary act of 1887, as corrected in 1888, the Circuit Courts of the United States are given original cognizance, concurrent with the courts of the several States, of all suits of a civil nature, at common law or in equity, where the matter in dispute exceeds, (except perhaps in the case of land grants), exclusive of interest and costs, the sum or value of two thousand dollars, in the following cases:

1. Arising under the Constitution or laws of the United States, or treaties made under their authority.

2. In which the United States are plaintiffs or petitioners.

3. Controversies between citizens of different States.

4. Controversies between citizens of the same State claiming lands under grants of different States.

5. Controversies between citizens of a State and foreign States, citizens or subjects.

25 Stat. 434, 1 U. S. Comp. Stat. (1901) p. 508.

And said act of 1887-1888 provides, in Section 2, for the removal of causes, as follows:

I. "That any suit of a civil nature, at law or in equity, arising under the Constitution or laws of the United States, or treaties made, or which shall be made, under their authority, of which the circuit courts of the United States are given original jurisdiction by the preceding section, which may now be pending, or which may hereafter be brought, in any State court, may be removed by the defendant or defendants therein to the Circuit Court of the United States for the proper district."

II. "Any other suit of a civil nature, at law or in equity, of which the circuit courts of the United States are given jurisdiction by the preceding section, and which are now pending, or which may hereafter be brought, in any State court, may be removed into the Circuit Court of the United States for the proper district by the defendant or defendants therein, being non-residents of that State."

III. "And when in any suit mentioned in this section there shall be a controversy which is wholly between citizens of different States and which can be fully determined as between them, then either one or more of the defendants actually interested in such controversy may remove said suit into the Circuit Court of the United States for the proper district."

IV. "And where a suit is now pending, or may hereafter be brought, in any State court, in which there is a controversy between a citizen of the State in which the suit is brought and a citizen of another State, any defendant, being such citizen of another State, may remove such suit into the Circuit Court of the United States for the proper district, at any time before the trial thereof, when it shall be made to appear to said Circuit Court that from prejudice or from local influence he will not be able to obtain justice in such State court, or in any other State court to which the said defendant may, under the laws of the State, have the right, on account of such prejudice or local influence, to remove said cause."

"*Provided*, That if it further appear that said suit can be fully and justly determined as to the other defendants in the State court, with out being affected by such prejudice or local influence, and that no party to the suit will be prejudiced by a separation of the parties, said Circuit Court may direct the suit to be remanded, so far as relates to such other defendants, to the State court, to be proceeded with therein."—25 Stat. 434, 1 U. S. Comp. (1901), 509.

Section 3 of said act of 1887-88 provides that within the three cases first mentioned in Section 2, above quoted, the petition for removal must be filed in the State court at the time or any time before the defendant is required by the laws of the State to plead to or answer the declaration or complaint.—25 Stat. 434, 1 U. S. Comp. (1901), p. 510.

It is thoroughly settled that under this act the Circuit Court of the United States has no jurisdiction, either original or by removal from a State court, of a suit as one arising under the Constitution, laws or treaties of the United States, unless that appears by the plaintiff's statement to be a necessary part of his claim; and that if it does not appear at the outset that the suit is one of which the Circuit Court at the time its jurisdiction is invoked could properly take cognizance, the lack of jurisdiction cannot be supplied by anything set up in the application for removal or in the defense interposed.—

Colorado Mining Co. v. Turck, 150 U. S. 138;
Tennessee v. Union & Planters' Bank, 152 U. S. 454;
Chappell v. Waterworth, 155 U. S. 102;
Postal Telegraph-Cable Co. v. Alabama, 155 U. S. 482;
East Lake v. Brown, 155 U. S. 488;
Burgmeyer v. Idler, 159 U. S. 408;
Oregon Short Line Ry. Co. v. Scottowe, 162 U. S. 490;
Hanford v. Davies, 163 U. S. 273;
Third Street Suburban Ry. Co. v. Lewis, 173 U. S. 457;
Arkansas v. Kansas & Texas Coal Co., 183 U. S. 185;
Spencer v. Dunlap Silk Co., 191 U. S. 526.

It also settled that "when a suit does not really and substantially involve a dispute or controversy as to the effect or construction of the Constitution or laws of the United States, upon the determination of which the result depends, it is not a suit arising under the Constitution and laws."

Western Union Tel. Co. v. Ann Arbor Rd. Co., 178 U. S. 239, 243, 244;
Lampassas v. Bell, 180 U. S. 276;
Northern Pacific Ry. v. Soderberg, 188 U. S. 526, 528;
Defiance Water Co. v. Defiance, 191 U. S. 184, 190, 191;

Bankers' Casualty Co. v. Minneapolis etc. Ry. Co., 192 U. S. 371, 385;
Cosmopolitan Mining Co. v. Walsh, 193 U. S. 460;
Sloan v. United States, 193 U. S. 614.

And when the jurisdiction of the Circuit Court is invoked on the ground of diverse citizenship, the judgment of the Circuit Court of Appeals is final, even though another ground for jurisdiction in the Circuit Court may be developed in the course of the subsequent proceedings in the case.—

Colorado Mining Co. v. Turck, 150 U. S. 138;
Burgmeyer v. Idler, 159 U. S. 408;
Press Publishing Co. v. Monroe, 164 U. S. 105;
Exparte Jones, 164 U. S. 691;
Spencer v. Dunlap Silk Co., 191 U. S. 526.

Testing the record by these well settled rules there was no possible ground of jurisdiction in the Circuit Court other than diversity of citizenship. Upon that ground Federal jurisdiction was invoked and assumed—whether correctly or erroneously is not conceived to be a pertinent inquiry to the consideration of this motion. The judgment of the Circuit Court of Appeals is therefore final under Section 6 of the act creating the Circuit Court of Appeals, and the writ of error should be dismissed for the want of jurisdiction.—

Colorado Central Mining Co. v. Turck, 150 U. S. 138;
Burgmeyer v. Idler, 159 U. S. 408;
Press Publishing Co. v. Monroe, 164 U. S. 105;
Exparte Jones, 164 U. S. 691;
Third St. Ry. v. Louisville, etc. Ry., 173 U. S. 573;
Huguley Mfg. Co. v. Galeton Cotton Mills, 184 U. S. 290;
Spencer v. Duplan Silk Co., 191 U. S. 526;
Bankers' Casualty Co. v. Minneapolis etc. Co., 192 U. S. 371.

The jurisdiction of the Circuit Court was none the less "dependent entirely" upon diverse citizenship because of the fact that the removal was upon the ground of prejudice or local influence.

The fourth clause of Section 2, quoted in the foregoing statement, does not furnish a separate and independent ground of Federal jurisdiction as was, soon after its passage, held by some of the Circuit Courts, but "describes only a special case comprised in the preceding clauses." In re Pennsylvania Company, 137 U. S. 451, 456, approving Malone v. Richmond & Danville Railroad, 35 Fed. 625, where it had held by Mr. Jus-

tice Harlan that the clause providing for removal on the ground of prejudice or local influence is restricted "to suits in which there is a controversy between citizens of different States;" that this clause "does not describe a new class of suits, removable from the State courts, but only specifies a distinct ground for removing one class of suits previously defined, namely, that class in which there is a controversy between citizens of different States," and that the clause "cannot well be separated, in the process of interpretation, from the preceding clause of the same section, which, by referring to the first section, requires as a condition of the removal of a suit because of diverse citizenship—the only kind of a suit in which the existence of prejudice or local influence, as affecting the right of removal, is of any consequence—that the matter in dispute shall exceed in value $2,000, exclusive of interest and costs."

"A petition and bond for removal are in the nature of process. They constitute the process by which the case is transferred from the State to the Federal court."

Kinney v. Columbia Savings Association, 191 U. S. 78, 82.

Prejudice or local influence being a mere incident to diverse citizenship, and incapable of a separate and independent existence, its presence is important only in the procedure of removal. Ordinarily, the petition for removal must be made to the State court, at or before the time the defendant is required by the laws of the State to answer the declaration or complaint. If denied by the State court, the application may be made to the Circuit Court of the United States. But if there be, in addition to the requisite diversity of citizenship, prejudice or local influence, the application may be made to the Circuit Court of the United States at any time before the trial of the cause. However removed, a Federal question upon the solution of which the result depends, cannot be evolved from the machinery of removal.

To avoid the finality of the judgment of the Circuit Court of Appeals, some other distinct ground of Federal jurisdiction than diversity of citizenship must have existed and must have been relied on.

Benjamin v. New Orleans, 169 U. S. 161, 164.

No such other ground is disclosed by the record.

Respectfully submitted,

William L. Martin

Attorney for Defendant in Error.

Office Supreme Court U. S.
FILED
OCT 24 1904
JAMES H. McKENNEY,
Clerk.

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SUPREME COURT OF THE UNITED STATES,

OCTOBER TERM, 1904.

JOHN J. COCHRAN AND THE FIDELITY & DEPOSIT COMPANY OF MARYLAND,
Petitioners,

vs.

THE COUNTY OF MONTGOMERY,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT.

Brief of

WILLIAM L. MARTIN, *for Respondent,*

Against the Granting of Certiorari.

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STATEMENT.

This cause has been three times tried in the Circuit Court and three times in the Court of Appeals.—121 Fed. 17; 126 Fed. 456; 128 Fed. 1019.

The suit was brought January 21, 1902, in the City Court of Montgomery, a State court, in the State of Alabama, by the County of Montgomery, one of the counties of the State of Alabama, against John J. Cochran, a citizen of said county and State, and the Fidelity & Deposit Company of Maryland, a corporation of the State of Maryland; said Cochran being the Treasurer of the plaintiff county and said Fidelity & Deposit Company of Maryland (hereinafter called the surety company) being the sole surety on the official bond of said Cochran as such county treasurer; the purpose of the suit as shown by the complaint, being the recovery of damages for certain alleged breaches of said official bond. The bond is payable, conditioned and approved

in all respects as provided by the statute law of Alabama, and it is in the penal sum of $120,000.

The complaint as filed in the State court and as it stood at the time of the removal of the cause to the Federal court contained five counts (pp. 5-12) each count showing the official character of Cochran, the due execution of the bond, setting it out, and charging as a breach thereof the conversion by Cochran of certain specified sums of money belonging to the plaintiff county and which came into Cochran's hands as county treasurer, by making a general deposit thereof to his credit in a certain named bank whereby the money was lost to the plaintiff, and claiming damages in the sum of $120,000. The fourth count (pp. 8-10) went into details as to certain amounts belonging to the general fund of the county and deposited and lost as aforesaid. The fifth count, after showing the official character of Cochran, the execution of the bond, etc., shows the appointment by Cochran of one John P. Kohn, of the banking house of Josiah Morris & Company, as Cochran's deputy with full authority to transact all the business of the treasurer; the sale by the county board of revenue of $100,000 of county bonds, (issued under an act of the Legislature to raise a fund for building county roads and bridges), to Josiah Morris & Company for $111,109.58; that said Kohn accepted their check and executed to the board of revenue a receipt for said sum, in the name of the treasurer, charged the amount upon the treasurer's cash book as so much money received by the treasurer on account of the road and bridge fund, and assigns as a breach of the bond (p. 12) that Cochran as such treasurer "did unlawfully and knowingly permit said John P. Kohn to make a general deposit of the money, the proceeds of the sale of said bonds, to-wit: the sum of $111,109.58, and all other money of the county of Montgomery, amounting in the aggregate to the amount of one hundred and thirty thousand dollars, which came into his hands as treasurer as aforesaid, in the private bank of F. M. Billing, doing business under the name of Josiah Morris & Company, and after said deposit, the said John J. Cochran did knowingly and in violation of his official duty permit said F. M. Billing, doing business under the name of Josiah Morris & Company, to use and convert to his own use, all the pro-

ceeds of the sale of said bonds, as well as all other money of the county, which came into his hands as treasurer as aforesaid in the amount of one hundred and thirty thousand dollars," to the damage of the plaintiff as stated at the beginning of the count—one hundred and twenty thousand dollars.

Demurrers to the complaint were severally filed by the defendants in the State court.

On the 15th day of February, 1902, the surety company presented to the District Judge of the United States for the Middle District of Alabama a petition praying the removal of the cause on the ground of prejudice or local influence, and thereupon, on the same day, an order was made removing the cause into the Circuit Court of the United States. (Record, pp. 1-5).

The cause first came on to be heard in the Cirucit Court at the May Term thereof 1902, when the plaintiff moved to remand to the State court upon the ground that the Federal court was without jurisdiction—one of the defendants being a citizen of the same State as the plaintiff. The court overruled this motion.—116 Fed. 985. Upon that trial the plaintiff amended the complaint by adding four additional counts—to which the court sustained demurrers severally interposed by the defendants,—121 Fed. 17,—and the cause was tried upon the original complaint and the general issue and certain special pleas interposed by the defendants. The result was a judgment in favor of the plaintiff for the amount of the general fund converted, amounting then to $32,221.80, principal, and $4,648.12, interest thereon, making a total of $36,869.92.—121 Fed. 17. But under the rulings of the court upon that trial there was no recovery on account of the road and bridge fund. Upon writ of error sued out by the plaintiff county this judgment was reversed and a new trial ordered by the Court of Appeals.—121 Fed. 17. The amount of the general fund for which judgment had been rendered was, pending this writ of error, voluntarily paid by the surety company.

Upon the second trial in the Circuit Court, May 28, 1903, the plaintiff amended the complaint by striking out the fourth count and certain portions of the fifth count (in parentheses p. 26) relating to the general fund, and by adding three new counts numbered 6, 7,

and 8, these being the identical counts of that number which were before the Court of Appeals in 121 Fed. 17. The breach alleged in the 6th count (p. 20) is the representation by Cochran that the purchase money for the bonds had been paid to him as county treasurer whereby the board of revenue was induced to deliver the bonds to the purchaser with resultant liability to the county; the breach alleged in the 7th count (p. 32) being the deposit of the money in the bank where it was lost to the plaintiff, and the breach alleged in the 8th count (p. 34) being the wrongful failure of Cochran to collect the proceeds of the bond sale.

There was no suggestion of any new claim in any of the added counts; but the facts were stated in greater detail, one of the amended counts (the 7th) showing, among other things, that *the arrangement by which Cochran appointed Kohn his deputy and deposited the money of the county in the bank where Kohn was employed was known to the surety company when it became the surety of Cochran.*

The second trial resulted in a judgment May 28, 1903, in favor of the plaintiff for $67,103.05, which was less than the amount claimed. Upon this judgment cross writs of error were sued out from the Circuit Court of Appeals and the judgment was reversed on the writ sued out by the plaintiff county and a new trial ordered.—126 Fed. 456.

Going beyond the present record and looking to the printed record upon the cross writs of error in the Court of Appeals, being No. 1296 in that court, it may be here stated that upon the second trial in the Circuit Court the plaintiff renewed and insisted upon its motion to remand the cause to the State court, which motion was resisted by the defendants and overruled by the court.—See pages 18 to 20 and 66 to 68 of that record, a copy of which is herewith lodged with the Clerk of the Supreme Court in support of this statement. The relevancy of this action will be hereinafter pointed out.

The third trial, which was had in the Circuit Court February 3, 1904, resulted in a judgment in favor of the plaintiff county for $101,017.90, (pp. 102-104) being the full amount of the road and bridge fund converted by Cochran with interest thereon, less certain admitted payments made thereon by Cochran. This trial was

had upon the plea of the general issue to the complaint, the latter being the same as, after amendment, upon the second trial. There was no plea of payment. The court sustained demurrers to certain special pleas interposed by the defendants. These special pleas merely suggested a line of defense already twice held untenable by the Court of Appeals, the leading thought of the pleas being that Cochran did not in fact receive the money for the bonds but only received "a worthless check." Upon this last judgment the defendants sued out a writ of error from the Court of Appeals and the judgment was affirmed.—128 Fed. 1018; Record, p. 150. And upon this judgment of the Circuit Court of Appeals a writ of error has been sued out by Cochran and the surety company and the same is now pending in this court—a motion by defendant in error to dismiss the same having been postponed. No. 279, October Term, 1904.

Apparently apprehending that the writ of error must be dismissed for want of jurisdiction, the plaintiffs in error now ask for the writ of certiorari.

BRIEF.

Involving as it does only questions arising under the local law of Alabama with respect to the liability of a county treasurer and the surety of his official bond, the case is not one "falling within the category of questions of such gravity and general importance as to require the review of the conclusions of the Circuit Court of Appeals with reference to them."

In re Woods, 143 U. S. 202;
Forsyth v. Hammond, 166 U. S. 506.

In Lau Ow Bew, 141 U. S. 583, 587, Mr. Chief Justice Fuller, speaking for the court, said:

"It is evident that it is solely questions of gravity and importance that the Circuit Court of Appeals should certify to us for instructions; and it is only when such questions are involved that the power of this court to require a case in which the judgment and decree of the Court of Appeals is made final, to be certified, can be properly invoked. The inquiry upon this application, therefore, is whether the matter is of sufficient importance in itself, and sufficiently open to controversy, to

make it the duty of this court to issue the writ applied for in order that this case may be reviewed and determined as if brought here on appeal or writ of error."

It was held in that case that whether the Chinese restriction acts, in the light of the treaties between the United States and China, apply to a Chinese merchant, domiciled in the United States, who temporarily leaves the country for purposes of business or pleasure, *animo revertendi,* is such a question of gravity and importance.

In the case of In re Woods, 143 U. S. 202, 205, the learned Chief Justice, again speaking for the court, after reference to the expression in the Chinaman's case above quoted as to the granting of certiorari, said:

"This must necessarily be so in any view, and especially when it is considered that the Circuit Courts of Appeals were created for the purpose of relieving this court of the oppressive burden of general litigation, which impeded the examination and disposition of cases of public concern, and delayed suitors in the pursuit of justice.

"But in the interest of jurisprudence and uniformity of decisions, to use the language of the eminent jurist and statesman who had charge of the bill, provision was made under section six for such supervision on our part as would tend to avert diversity of judgments and guard against inadvertance of conclusion in controversies involving weighty and serious matters. * * *

"But we do not regard the inquiry as to whether it was settled law of the State of Minnesota that a judgment of dismissal in a former suit, such as pleaded here, was not a bar to a second suit upon the cause of action, or whether the law in respect to the recovery by a servant against his master for injuries received in the course of his employment was properly applied on the trial in this case, as falling within the category of these questions of such gravity and general importance as to require the review of the conclusions of the Circuit Court of Appeals in reference to them."

In Forsyth v. Hamonmd, 166 U. S. 506, the doctrine of the foregoing cases was reaffirmed, Mr. Justice Brewer, speaking for the court, saying, "And further that while this power is coextensive with all possible necessities and sufficient to secure to this court a final con-

trol over the litigations in all the Courts of Appeal, it is a power which will be sparingly exercised, and only when the circumstances of the case satisfy us that the importance of the question involved, the necessity of avoiding conflict between two or more Courts of Appeal or between Courts of Appeal and the Courts of a State, or some matter affecting the interest of this nation in its internal or external relations, demands such exercise."

In that case there was a sharply defined conflict between the decision of the Supreme Court of Indiana and the Circuit Court of Appeals, in that the one had declared that a certain proceeding by which certain territory was annexed to a certain municipality to be legal, while the other had declared it to be illegal.

In Security Trust Company v. Black River National Bank, 187 U. S. 211, where certorari was granted, there was a clear departure by the Circuit Court of Appeals from the Statutes and decisions of the Supreme Court construing them, of the State of Minnesota with reference to the time in which claims against decedents should be presented—the latter court having ignored the State statutes and decisions construing and applying them.

Alleged Reasons for Certorari.

The proposition advanced by the petitioners, that the Circuit Court of Appeals failed to give them the benefit of Alabama law on an Alabama contract is earnestly controverted by the respondent. To the contrary, the decision of the Court of Appeals is a correct exposition of the law of Alabama.—See 121 Fed. 17; 126 Fed. 456; 128 Fed. 1019.

Section 1428 of the Code of Alabama, 1896, provides that the county treasurer must, before entering upon the duties of his office, give bond in such sum as may be fixed by the court of county commissioners, "payable to the county, and conditioned as prescribed by law."

The condition prescribed by law is "faithfully to discharge the duties of such office during the time he continues therein, or discharges any of the duties thereof." —Code, Sec. 3070.

The bond is payable, conditioned and approved as prescribed by law.

Section 3087 declares the legal effect of official bonds as follows: "Every official bond is obligatory on the principal and sureties thereon—

"1. For any breach of the condition during the time the officer continues in office, or discharges any of the duties thereof.

"2. For the faithful discharge of any duties which may be required of such officer by any law passed subsequently to the execution of such bond, although no such condition is expressed therein.

"3. For the use and benefit of every person who is injured, as well as by any wrongful act committed under color of his office, as by his failure to perform, or the improper or neglectful performance of those duties imposed by law."

Section 1429, prescribing the duties of the county treasurer, provides: "It is the duty of the county treasurer—

"1. To receive and keep the money of the county, and disburse the same according to law." * * *

"10. * * * To demand and receive all moneys due to the county, and to institute proceedings against defaulters."

Section 4 of the act authorizing the issue of the bonds, which act is set out in the record at page 106, made the duty of the county treasurer to receive the proceeds of the sale of the road and bridge bonds and disburse the same under the direction of the board of revenue, and provided that the county treasurer should "be responsible for the safe keeping of all the proceeds arising from the sale of said bonds, which may come into his hands in his official capacity, the same as for other county funds or money in his hands as such county treasurer."

The statute above quoted, making every official bond obligatory on the principal and sureties thereon "for the faithful discharge of any duties which may be required of such officer by any law passed subsequently to the execution of such bond, although no such condition is expressed therein," has been in force many years and its validity is not open to question. The liability upon the bond of Cochran, with reference to the transaction involved in this suit, is the same as if the bond had been executed after the passage of the act providing for the sale of the road and bridge bonds.

Morrow v. Wood, 56 Ala. 1;
McRee v. Griffin, 66 Ala. 211;
Norton v. Kumpe, 121 Ala. 446.

By Section 4668 of the Code of Alabama, (Volume 2) it is provided: "Any probate judge, clerk of a court of record, register in chancery, sheriff, coroner, tax-collector, county treasurer, trustee of public schools, notary public, justice of the peace, constable, or other public officer, who knowingly converts to his own use, or permits another to use any of the revenues of the State, or of any county thereof, or any money paid into his office, or recived by him in his official capacity, is liable to indictment, and, on conviction, must be punished if he had stolen it."

Alston v. State, 92 Ala. 124;
Mitchell v. Rice, 132 Ala. 120.

In Alston v. State, 92 Ala. 124, it was held that where a judge of probate had received a check in payment for a license issued by him and had deposited the check in a bank to his credit in his official capacity, such a deposit was a conversion of the amount of the check and constituted a breach of his official bond. The solvency or insolvency of the bank was wholly immaterial. The court said among other things: "So far as Alston was concerned, the bank, by accepting the deposit, merely became his debtor and assumed the obligation to honor his checks to the amount so credited to him. The money of the State was thus turned over to the bank on general deposit and became a part of its funds and subject to its use as any other of its property. The use of the public money by the probate judge was without warrant of law. He had no right to convert it to his own use or permit anyone else to use it. The deposit was of like effect as a loan of money. It was an unauthorized use thereof. The probate judge by that act voluntarily relinquished his custody and control of this public fund so that he could not reclaim it. When the State demands it his answer is that he no longer has it, but has a claim for the amount against an insolvent bank. In view of the statutory provisions above referred to, we think that his answer is wholly insufficient as a defense. The effect of the statutes is to make the probate judge a

custodian of that money and to prohibit him from permitting another to use it."

This case is cited with approval in the late case of Mitchell v. Rice, 132 Ala. 120, where it was held that the unauthorized deposit in a bank by a register in chancery of the proceeds of land sold by him under a decree of the court "was an unlawful disposition of these proceeds," imposing liability on his official bond.

It is the law in Alabama, as elsewhere, that the deposit of a check in a bank upon which it is drawn, to the credit of the depositor, is in legal effect precisely the same as if the money had been paid over the counter to the holder of the check and immediately by him returned to the bank as a general deposit.

City National Bank v. Burns, 68 Ala. 267, 275;
National Bank v. Burkhart, 100 U. S. 689;
Oddie v. National City Bank, 45 N. Y. 735;
More on Banks and Banking, p. 321.

While it is true that a public officer is not authorized to receive anything but money in payment of public dues, it is equally true that if he does so, and injury to the public results therefrom, it is a breach of his official bond. It should not be overlooked that by section 3087 of the Code of Alabama, above quoted, the neglectful performance of an official duty is within the terms of the bond as well as a total failure or other wrongful act.

It is a well settled doctrine, resting upon the weightiest consideration of public policy, that neither the State nor a political subdivision thereof, is bound by the lashes or unauthorized acts of any of its public officers.

Jackson County v. Derrick, 117 Ala. 348, 365;
State v. Lott, 69 Ala. 147, 155;
State v. Brewer, 64 Ala. 287, 298.

The proposition that a county treasurer may accept a check or a bank deposit or anything else in payment of a public debt and thereafter escape liability upon the ground of want of authority on his part to do so, is so palpably untenable that it seems to be sufficient to say that no respectable authority has been or can be cited in its support.

The record shows that when Cochran applied to the

surety company to make his bond, the question was asked him where he would keep the money, and he answered, that he would deposit it with Josiah Morris & Company. (Record, p. 109.)

So the surety company was a party to the plan to place the money of the county in that bank. And no doubt it was further understood between them that the bank should name a deputy to perform the duties of the office, but whether so or not, the surety company (if at all material) is chargeable by law with notice of the appointment of the deputy; and both the principal and surety are responsible for his conduct in the performance of his duties as such deputy.

9 Am. and Eng. Enc. of Law (2d ed.) pp. 390, 393, 395.

The doctrine that a party cannot recover in a court of justice when he must found his right upon an illegal or immoral transaction, or one otherwise offensive to public policy, in which he participated, has no application here. The plaintiff county did not require the aid of an illegal transaction, in which it participated, to support its case. The test is whether the party is "obliged to lay the foundation of his action on his own violation of the law."

Clark v. Colbert, 67 Ala. 92;
Ware v. Curry, 67 Ala. 274, 283;
Jemison v. Birmingham etc. R. Co., 125 Ala. 378, 383.

The application for certiorari is believed to be without merit from any standpoint.

Starting out with the assertion that the decision of the Court of Appeals is contrary to "the peculiar law of Alabama," it passes over to "uniformity of practice" in the interest of that vast business known as fidelity insurance, and finally settles down with great doubt upon the "entirely novel" question, namely, whether the surety company has led the Circuit Court into error in directing a removal of the cause from the State Court to the Federal Court.

The uniformity of practice plea could be made with equal propriety by any dissatisfied litigant in the Federal courts.

Having invoked Federal jurisdiction and tenaciously clung to it so long as there was hope for its favorable exercise, the petitioners evidently desire the Supreme Court to now take the case upon certiorari and relieve them of the result of speculating upon the "entirely novel" question of Federal jurisdiction by remanding the cause to the State court.

While the question of jurisdiction is one which can not be waived by the parties in a case like this, it is not believed that the court will lend the petitioners a helping hand to a position where they may have the benefit of a decision possibly relieving them of the consequences of their speculation upon that question.

Although complaining of the first decision of the Court of Appeals, the defendants rejected the plaintiff's invitation, extended upon the second trial, to return to the State court. The jurisdiction having been impliedly sustained by the Court of Appeals, the Circuit Court was bound thereby upon the second trial (Aspin Mining Co. v. Billings, 150 U. S. 31; May's Executors v. Skillern's Executors, 6 Cranch, 267) but of course that could have been remedied by consent on the part of the defendants to the plaintiff's motion to remand. And when it is further known that the case was triable in the City Court without the intervention of a jury and the judgment reviewable by the Supreme Court of Alabama without any presumptions in favor of its correctness, the refusal of the defendants to return to the State Court as invited upon the second trial in the Circuit Court and after the Court of Appeals had decided against them, is hard to reconcile with their present contention that the Court of Appeals failed to follow Alabama law.

The Respondent respectfully submits that in no possible view of the case does the situation call for the exercise of the power to grant certiorari.

Respectfully submitted.

WILLIAM L. MARTIN,
For Respondent Montgomery County.

FILE COPY

SUPREME COURT OF THE UNITED STATES,

OCTOBER TERM, 1904.

JOHN J. COCHRAN AND THE FIDELITY & DEPOSIT COMPANY OF MARYLAND,
Plaintiffs in Error,

vs.

THE COUNTY OF MONTGOMERY,
Defendant in Error.

ERROR TO THE CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT.

AND

JOHN J. COCHRAN AND THE FIDELITY & DEPOSIT COMPANY OF MARYLAND,
Petitioners,

vs.

THE COUNTY OF MONTGOMERY,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT.

BRIEF OF

WILLIAM L. MARTIN,

FOR DEFENDANT IN ERROR, AND RESPONDENT,

On Motion to Dismiss the Writ of Error; on the Application for *Certiorari,* and on the Merits.

STATEMENT OF THE CASE.

This cause has been three times tried in the Circuit Court and three times in the Court of Appeals.—121 Feb. 17; 126 Fed. 456; 128 Fed. 1019.

The suit was brought January 21, 1902, in the City Court of Montgomery, a State court, in the State of Alabama, by the County of Montgomery, one of the counties of the State of Alabama, against John J. Cochran, a citizen of said county and State, and the Fidelity & Deposit Company of Maryland, a corporation of the State of Maryland; said Cochran being the Treasurer of the plaintiff county and said Fidelity & Deposit Company of Maryland (hereinafter called the surety company) being the sole surety on the official bond of said Cochran as such county treasurer; the purpose of the suit as shown by the complaint, being the recovery of damages for certain alleged breaches of said official bond. The bond is payable, conditioned and approved in all respects as provided by the statute law of Alabama, and it is in the penal sum of $120,000.

The complaint as filed in the State court and as it stood at the time of the removal of the cause to the Federal court contained five counts (pp. 5-12) each count showing the official character of Cochran, the due execution of the bond, setting it out, and charging as a breach thereof the conversion by Cochran of certain specified sums of money belonging to the plaintiff county and which came into Cochran's hands as county treasurer, by making a general deposit thereof to his credit in a certain named bank whereby the money was lost to the plaintiff, and claiming damages in the sum of $120,000. The fourth count (pp. 8-10) went into details as to certain amounts belonging to the general fund of the county and deposited and lost as aforesaid. The fifth count, after showing the official character of Cochran, the execution of the bond, etc., shows the appointment by Cochran of one John P. Kohn, of the banking house of Josiah Morris & Company, as Cochran's deputy with full authority to transact all the busi-

ness of the treasurer; the sale by the county board of revenue of $100,000 of county bonds, (issued under an act of the Legislature to raise a fund for building county roads and bridges), to Josiah Morris & Company for $111,109.58; that said Kohn accepted their check and executed to the board of revenue a receipt for said sum, in the name of the treasurer, charged the amount upon the treasurer's cash book as so much money received by the treasurer on account of the road and bridge fund, and assigns as a breach of the bond (p. 12), that Cochran as such treasurer "did unlawfully and knowingly permit said John P. Kohn to make a general deposit of the money, the proceeds of the sale of said bonds, to-wit: the sum of $111,109.58, and all other money of the county of Montgomery, amounting in the aggregate to the amount of one hundred and thirty thousand dollars, which came into his hands as treasurer as aforesaid, in the private bank of F. M. Billing, doing business under the name of Josiah Morris & Company, and after said deposit, the said John J. Cochran did knowingly and in violation of his official duty permit said F. M. Billing, doing business under the name of Josiah Morris & Company, to use and convert to his own use, all the proceeds of the sale of said bonds, as well as all other money of the county, which came into his hands as treasurer as aforesaid in the amount of one hundred and thirty thousand dollars," to the damage of the plaintiff as stated at the beginning of the count—one hundred and twenty thousand dollars.

Demurrers to the complaint were severally filed by the defendants in the State court.

Such being the status of the case, on the 15th day of February, 1902, The Fidelity & Deposit Company of Maryland presented to the District Judge of the United States for the Middle District of Alabama its petition for the removal of the cause into the Circuit Court of the United States for said district, the petition (pp. 1-4) alleging, among other things, that the matter in dispute exceeds the sum of two thousand dollars exclusive of interest and costs, and "*that the said controversy is between citizens of different States, in that the plaintiff*

was at the time of the commencement of said suit, and still is, a citizen of the State of Alabama; and your petitioner, The Fidelity & Deposit Company of Maryland, was at the time of the commencement of said suit, and still is, a citizen of the State of Maryland, and of no other State, having its principal office in the city of Baltimore, in the State of Maryland, and that your petitioner desires to remove this suit, which is now pending and undetermined in said State Court, before the trial thereof, into the Circuit Court of the United States, to be held in the Middle District of Alabama." (Italics ours.)

The petition then avers, "that from prejudice or local influence in favor of the plaintiff, and adverse to this defendant, it will not be able to obtain justice in said court, or in any other State Court to which the defendant may, under the laws of this State, have the right to remove said cause, on account of said prejudice or local influence"; that the suit is against John J. Cochran, the treasurer of said county, and petitioner, a surety company and a surety on the official bond of said Cochran as such treasurer, to recover the sum of one hundred and twenty thousand dollars, the full penalty of the bond, "alleged to have been deposited by the said John J. Cochran, as such county treasurer, in the banking house of Josiah Morris & Company of Montgomery, Alabama, whereby the said sum is alleged to have been lost to the said county of Montgomery by reason of the failure and insolvency of the said Josiah Morris & Company; and that by reason of the nature of said suit, all the residents and citizens of said Montgomery County have a direct interest in the recovery by the said plaintiff of the amount claimed."

The petition further alleges that John J. Cochran "is practically financially irresponsible, in that his assets, your petitioner is informed and believes, and so states, are less than five thousand dollars, and that the said Cochran is, therefore, practically only a nominal party to the suit, and that your said petitioner, the said Fidelity & Deposit Company of Maryland, would be obliged to meet practically the whole claim should the judgment

be rendered against the defendants," and that statements have been made in the public press and circulated throughout the State, "to the effect that your petitioner is and will be held liable for the amount claimed in said suit, and will have to pay the same," whereby a local prejudice was created and exists against petitioner and in favor of the plaintiff throughout the whole of the State of Alabama; that the fund in controversy constitutes practically all the funds of the plaintiff county, and its inability to use such funds for public purposes has caused a feeling of prejudice against petitioner throughout the State; that the petitioner "is the surety on the bonds of many State and County officials throughout the whole State of Alabama, and that the decision in the present case will be regarded as probably constituting a precedent in any future case or cases which may be brought against your petitioner on said bonds, by reason of which there will necessarily exist a local prejudice against your petitioner in this case in any county of the State of Alabama in which said case should be tried."

The petitioner then shows that at the time of the failure of said banking house it was largely indebted; that it procured an agreement of extension from its creditors which it failed to carry out, resulting in great disappointment and dissatisfaction to its creditors, and that this suit has been in some way intermingled with the affairs of said banking house in the minds of the people and in the supposed identity of the interests of the said Josiah Morris & Company and petitioner and that consequently there exists local prejudice in any State court in which said cause could be tried.

Upon the filing of the petition the District Judge made an order (pp. 16-17), reciting the fact of the filing of the petition "and it appearing to this Court that from local prejudice or local influence, The Fidelity & Deposit Company will not be able to obtain justice in said City Court of Montgomery, or in any other State Court to which the said The Fidelity & Deposit Company may, under the laws of the State of Alabama, have the right, on account of said prejudice or local influence, to remove said cause; and whereas this court is of the opinion that said cause should be removed to this court upon the exe-

cution by the petitioner of a bond in the penalty of one thousand dollars," etc., which bond, the order recites, has been given and approved, and proceeds: "Now, therefore, it is ordered, adjudged and decreed by the Circuit Court of the United States for the Middle District of Alabama, that the above stated cause be and the same is hereby removed from the said City Court of Montgomery, into the said Circuit Court of the United States for the Middle District of Alabama." Then follows an order in reference to transcripts.

The cause first came on to be heard in the Circuit Court at the May Term thereof 1902, when the plaintiff moved to remand to the State Court upon the ground that the Federal court was without jurisdiction—one of the defendants being a citizen of the same State as the plaintiff. The court overruled this motion.—116 Fed. 985. Upon that trial the plaintiff amended the complaint by adding four additional counts—to which the court sustained demurrers severally interposed by the defendants,—121 Fed. 17,—and the cause was tried upon the original complaint and the general issue and certain special pleas interposed by the defendants. The result was a judgment in favor of the plaintiff for the amount of the general fund converted, amounting then to $32,221.80, principal, and $4,648.12, interest thereon, making a total of $36,869.92.—121 Fed. 17. But under the ruling of the court upon that trial there was no recovery on account of the road and bridge fund. Upon writ of error sued out by the plaintiff county this judgment was reversed and a new trial ordered by the Court of Appeals.—121 Fed. 17. The amount of the general fund for which judgment had been rendered was, pending this writ of error, voluntarily paid by the surety company.

Upon the second trial in the Circuit Court, May 28, 1903, the plaintiff amended the complaint by striking out the fourth count and certain portions of the fifth count (in paretheses, p. 26), relating to the general fund, and by adding three new counts, numbered 6, 7, and 8, these being the identical counts of that number which were before the Court of Appeals in 121 Fed. 17. The breach alleged in the 6th count (p. 20) is the rep-

resentation by Cochran that the purchase money for the bonds had been paid to him as county treasurer whereby the board of revenue was induced to deliver the bonds to the purchaser with resultant liability to the county; the breach alleged in the 7th count (p. 32) being the deposit of the money in the bank where it was lost to the plaintiff, and the breach alleged in the 8th count (p. 34) being the wrongful failure of Cochran to collect the proceeds of the bond sale.

There was no suggestion of any new claim in any of the added counts; but the facts were stated in greater detail, one of the amended counts (the 7th) showing, among other things, that *the arrangement by which Cochran appointed Kohn his deputy and deposited the money of the county in the bank where Kohn was employed was known to the surety company when it became the surety of Cochran.*

The second trial resulted in a judgment May 28, 1903, in favor of the plaintiff for $67,103.05, which was less than the amount claimed. Upon this judgment cross writs of error were sued out from the Circuit Court of Appeals and the judgment was reversed on the writ sued out by the plaintiff county and a new trial ordered.—126 Fed. 456.

Going beyond the present record and looking to the printed record upon the cross writs of error in the Court of Appeals, being No. 1296 in that court, it may be here stated that upon the second trial in the Circuit Court the plaintiff renewed and insisted upon its motion to remand the cause to the State court, which motion was resisted by the defendants and overruled by the court.—See pages 18 to 20 and 66 to 68 of that record, a copy of which is herewith lodged with the clerk of the Supreme Court in support of this statement. The relevancy of this action will be hereinafter pointed out.

The third trial which was had in the Circuit Court February 3, 1904, resulted in a judgment in favor of the plaintiff county for $101,017.90, (pp. 102-104), being the full amount of the road and bridge fund converted by Cochran, with interest thereon, less certain admitted payments made thereon by Cochran. This trial was

had upon the plea of the general issue to the complaint, the latter being the same as after amendment upon the second trial. There was no plea of payment. The court sustained demurrers to certain special pleas interposed by the defendants. These special pleas merely suggested a line of defense already twice held untenable by the Court of Appeals, the leading thought of the pleas being that Cochran did not in fact receive the money for the bonds, but only received "a worthless check." Upon this last judgment the defendants sued out a writ of error from the Court of Appeals and the judgment was affirmed.—128 Fed. 1018; Record, p. 150. And upon this judgment of the Circuit Court of Appeals the present writ of error was sued out in May, 1904. On October 11, 1904, the defendant in error submitted a motion to dismiss the writ of error on the ground that the judgment of the Court of Appeals is final—the jurisdiction being dependent entirely on diverse citizenship—but the court a week later postponed the consideration of the motion until the case is reached for hearing. On October 24, 1904, the plaintiffs in error applied for the writ of certiorari (No. 401, Oct. Term, 1904), and the consideration of this application was by the court postponed until No. 279 is reached for hearing.

BRIEF ON THE MOTION TO DISMISS THE WRIT OF ERROR.

The jurisdiction of the Court of Appeals depended entirely on diverse citizenship; hence its decision is final.

"On every writ of error or appeal, the first and fundamental question is that of jurisdiction, first of this court, and then of the court from which the record comes."

Continental National Bank v. Buford, 191 U. S. 119.

The court is now concerned with the question of its own jurisdiction; but in order to determine that question it is necessary to ascertain the ground upon which the jurisdiction of the Circuit Court was invoked, and whether that jurisdiction was "dependent entirely up-

on the opposite parties to the suit or controversy being . . . citizens of different States." If that jurisdiction was so "dependent entirely," then the judgment of the Circuit Court of Appeals is final.

Act of March 3, 1891, c. 514, 26 Stat. 828, 1 U. S. Comp. (1901), p. 550.

What are the grounds of Circuit Court jurisdiction?

By Section 1 of the judiciary act of 1887, as corrected in 1888, the Circuit Courts of the United States are given original cognizance, concurrent with the courts of the several States, of all suits of a civil nature, at common law or in equity, where the matter in dispute exceeds, (except perhaps in the case of land grants), exclusive of interest and costs, the sum or value of two thousand dollars, in the following cases:

1. Arising under the Constitution or laws of the United States, or treaties made under their authority;
2. In which the United States are plaintiffs or petitioners;
3. Controversies between citizens of different States.
4. Controversies between citizens of the same State claiming lands under grants of different States;
5. Controversies between citizens of a State and foreign States, citizens or subjects.

25 Stat. 434, 1 U. S. Comp. Stat. (1901), p. 508.

And said act of 1887-1888 provides, in Section 2, for the removal of causes, as follows:

I. "That any suit of a civil nature, at law or in equity, arising under the Constitution or laws of the United States, or treaties made, or which shall be made, under their authority, of which the circuit courts of the United States are given original jurisdiction by the preceding section, which may now be pending, or which may hereafter be brought, in any State court, may be removed by the defendant or defendants therein to the Circuit Court of the United States of the proper district."

II. "Any other suit of a civil nature, at law or in equity, of which the Circuit Courts of the United States are given jurisdiction by the preceding section, and which may now be pending, or which may hereafter be brought, in any State court, may be removed into the

Circuit court of the United States for the proper district by the defendant or defendants therein, being non-residents of that State."

III. "And when in any suit mentioned in this section there shall be a controversy which is wholly between citizens of different States and which can be fully determined as between them, then either one or more of the defendants actually interested in such controversy may remove said suit into the Circuit Court of the United States for the proper district."

IV. "And where a suit is now pending, or may hereafter be brought, in any State court, in which there is a controversy between a citizen of the State in which the suit is brought and a citizen of another State, any defendant, being such citizen of another State, may remove such suit into the Circuit Court of the United States for the proper district, at any time before the trial thereof, when it shall be made to appear to said Circuit Court that from prejudice or from local influence he will not be able to obtain justice in such State court, or in any other State Court to which the said defendant may, under the laws of the State, have the right on account of such prejudice or local influence, to remove said cause."

"*Provided*, That if it further appear that said suit can be fully and justly determined as to other defendants in the State court, without being affected by such prejudice or local influence, and that no party to the suit will be prejudiced by a separation of the parties, said Circuit Court may direct the suit to be remanded, so far as relates to such other defendants, to the State court, to be proceeded with therein."—25 Stat. 434, 1 U. S. Comp. (1901), 509.

Section 3 of said act of 1887-88 provides that in the three cases first mentioned in Section 2, above quoted, the petition for removal must be filed in the State court at the time or any time before the defendant is required by the laws of the State to plead to or answer the declaration or complaint.—25 Stat. 434, 1 U. S. Comp. (1901), p. 510.

It is thoroughly settled that under this act the Circuit Court of the United States has no jurisdiction, either original or by removal from a State court, of a suit as one arising under the Constitution, laws or treaties of the United States, unless that appears by the plaintiff's statement to be a necessary part of his claim; and that if it does not appear at the outset that the suit is one of which the Circuit Court at the time its jurisdiction is invoked could properly take cognizance, the lack of jurisdiction cannot be supplied by anything set up in the application for removal or in the defense interposed.—

Colorado Mining Co. v. Turck, 150 U. S. 138;
Tennessee v. Union & Planters' Bank, 152 U. S. 454;
Chappell v. Waterworth, 155 U. S. 102;
Postal Telegraph-Cable Co. v. Alabama, 155 U. S. 482;
East Lake v. Brown, 155 U. S. 488;
Burgmeyer v. Idler, 159 U. S. 408;
Oregon Short Line Ry. Co. v. Scottowe, 162 U. S. 490;
Hanford v. Davies, 163 U. S. 273;
Walker v. Collins, 167 U. S. 57;
Third Street Suburban Ry. Co. v. Lewis, 173 U. S. 457;
Arkansas v. Kansas & Texas Coal Co., 183 U. S. 185;
Spencer v. Duplan Silk Co., 191 U. S. 526;
Minnesota v. Northern Securities Co., 194 U. S. 48, 63, 64.

It is also settled that "when a suit does not really and substantially involve a dispute or controversy as to the effect or construction of the Constitution or laws of the United States, upon the determination of which the result depends, it is not a suit arising under the Constitution and laws."

Western Union Tel. Co. v. Ann Arbor Rd. Co., 178 U. S. 239, 243, 244;
Lampassas v. Bell, 180 U. S. 276;
Northern Pacific Ry. v. Soderberg, 188 U. S. 526, 528;

Defiance Water Co. v. Defiance, 191 U. S. 184, 190, 191;
Bankers' Casualty Co. v. Minneapolis etc. Ry. Co., 192 U. S. 371, 385;
Cosmopolitan Mining Co. v. Walsh, 193 U. S. 460;
Sloan v. United States, 193 U. S. 614;

And when the jurisdiction of the Circuit Court is invoked on the ground of deverse citizenship, the judgment of the Circuit Court of Appeals is final, even though another ground for jurisdiction in the Circuit Court may be developed in the course of the subsequent proceedings in the case.—

Colorado Mining Co. v. Turck, 150 U. S. 138;
Burgmeyer v. Idler, 159 U. S. 408;
Press Publishing Co. v. Monroe, 164 U. S. 105;
Exparte Jones, 164 U. S. 691;
Spencer v. Duplan Silk Co., 191 U. S. 526.

To avoid the finality of the judgment of the Circuit Court of Appeals, some other distinct ground of Federal jurisdiction than diversity of citizenship must have existed and must have been relied on.

Benjamin v. New Orleans, 169 U. S. 161, 164.

The jurisdiction of the Circuit Court was none the less "dependent entirely" upon diverse citizenship because of the fact that the removel was upon the ground of prejudice or local influence.

The fourth clause of Section 2, quoted in the foregoing statement, does not furnish a separate and independent ground of Federal jurisdiction as was, soon after its passage, held by some of the Circuit Courts, but "describes only a special case comprised in the preceding clauses." In re Pennsylvania Company, 137 U. S. 541, 456, approving Malone v. Richmond & Danville Railroad, 35 Fed. 625, where it had held by Mr. Justice Harlan that the clause providing for removal on the ground of prejudice or local influence is restricted "to suits in which there is a controversy between citizens of different States;" that this clause "does not describe a new class of suits, removable from the State courts, but only specifies a distinct ground for removing one class of

suits, previously defined, namely, that class in which there is a controversy between citizens of different States," and that the clause "cannot well be separated, in the process of interpretation, from the preceding clause of the same section, which, by referring to the first section, requires as a condition of the removal of a suit because of diverse citizenship—the only kind of a suit in which the existence of prejudice or local influence, as affecting the right of removal, is of any consequence—that the matter in dispute shall exceed in value $2,000, exclusive of interest and costs."

"A petition and bond for removal are in the nature of process. They constitute the process by which the case is transferred from the State to the Federal court."

Kinney v. Columbia Savings Association, 191 U. S. 78, 82.

Prejudice or local influence being a mere incident to diverse citizenship, and incapable of a separate and independent existence, its presence is important only in the procedure of removal. Ordinarily, the petition for removal must be made to the State court, at or before the time the defendant is required by the laws of the State to answer the declaration or complaint. If denied by the State court, the application may be made to the Circuit Court of the United States. But if there be, in addition to the requisite diversity of citizenship, prejudice or local influence, the application may be made to the Circuit Court of the United States at any time before the trial of the cause. However removed, a Federal question upon the solution of which the result depends, cannot be evolved from the machinery of removal.

Testing the record by these well settled rules there was no possible ground of jurisdiction in the Circuit Court other than diversity of citizenship. Upon that ground Federal jurisdiction was necessarily invoked and assumed—whether correctly or erroneously is not conceived to be a pertinent inquiry to the consideration of this motion. The judgment of the Circuit Court of Appeals is therefore final under Section 6 of the act creating the Circuit Court of Appeals, and the writ of

error should be dismissed for the want of jurisdiction.—

Colorado Central Mining Co. v. Turck, 150 U. S. 138;
Burgmeyer v. Idler, 159 U. S. 408;
Press Publishing Co. v. Monroe, 164 U. S. 105;
Exparte Jones, 164 U. S. 691;
Third St. Ry. v. Douisville, etc. Ry., 173 U. S. 573;
Huguley Mfg. Co. v. Galeton Cotton Mills, 184 U. S. 290;
Spencer v. Duplan Silk Co., 191 U. S. 526;
Bankers' Casualty Co. v. Minneapolis etc. Co., 192 U. S. 371.

Counsel for plaintiffs in error, in their brief heretofore filed against this motion, refer to the Case of the Sewing Machine Companies, 18 Wall. 553, as "another case depending entirely on diverse citizenship," and say that "the case at bar could not have been removed on the ground of diverse citizenship entirely. But when a removal is ordered on the ground of prejudice or local influence, there is something more than diverse citizenship."

The result of the proposition would seem to be that when there is diversity of citizenship and the removal is because of local prejudice, the jurisdiction is dependent entirely on diverse citizenship; but if diversity of citizenship is wanting, then the jurisdiction is dependent on the "something more," namely, local prejudice. How the "something more" may exist in the absence of the principal thing, it is difficult to understand.

The Case of the Sewing Machine Companies, 18 Wall. 553, arose under the removal act of 1867 which, in so far as it described the suit to be removed (except the jurisdictional amount) used the same language we now find in clause 4 of section 2 of the act of 1887-88, the language being: "Where a suit is now pending, or may hereafter be brought, in any State court, in which there is a controversy between a citizen of the State in which the suit is brought and a citizen of another State." Further comparison will disclose that the only other differences between these two statutes relate to the parties who may remove and the procedure of removal.

That local prejudice in one case may be completely merged into the constitutional ground of diverse citizenship, and in another case made to serve as an independent ground of jurisdiction—outside of the constitution, —seems a most untenable proposition.

We must think that the local prejudice plays the same part in each case and that it can in no event be of consequence unless mounted on diverse citizenship.

Counsel for plaintiffs in error have filed against this motion a substantial copy of their brief filed in the Court of Appeals in support of the order of removel from the State court. We will not here engage in a discussion of the propriety of the order of removal form the State court, since it is not to be assumed that the Supreme Court will exercise appellate jurisdiction in advance of the ascertainment of its existence.

That the Circuit Court acted upon the assumption of the existence of diversity of citizenship, is clearly shown by the record. That is sufficient to stamp the judgment of the Court of Appeals with finality.—See Benjamin v. New Orleans, 169 U. S. 161, 164.

BRIEF AGAINST THE PETITION FOR CERTIORARI.

(1) *The rules observed in granting the writ.*

Involving as it does only questions arising under the local law of Alabama with respect to the liability of a county treasurer and the surety of his official bond, the case is not one "falling within the category of questions of such gravity and general importance as to require the review of the conclusions of the Circuit Court of Appeals with reference to them."

In re Woods, 143 U. S. 202;
Forsyth v. Hammond, 166 U. S. 506.

In Lau Ow Bew, 141 U. S. 583, 587, Mr. Chief Justice Fuller, speaking for the court, said:

"It is evident that it is solely questions of gravity and importance that the Circuit Court of Appeals should

certify to us for instructions; and it is only when such questions are involved that the power of this court to require a case in which the judgment and decree of the Court of Appeals is made final, to be certified, can be properly invoked. The inquiry upon this application, therefore, is whether the matter is of sufficient importance in itself, and sufficiently open to controversy, to make it the duty of this court to issue the writ applied for in order that this case may be reviewed and determined as if brought here on appeal or writ of error."

It was held in that case that whether the Chinese restriction acts, in the light of the treaties between the United States and China, apply to a Chinese merchaont, domiciled in the United States, who temporarily leaves the country for purposes of business or pleasure, *animo revertendi*, was such a question of gravity and importance.

In the case of In re Woods, 143 U. S. 202, 205, the learned Chief Justice, again speaking for the court, after reference to the expession in the Chinaman's case above quoted as to the granting of certiorari, said:

"This must necessarily be so in any view, and especially when it is considered that the Circuit Courts of Appeals were created for the purpose of relieving this court of the oppressive burden of general litigation, which impeded the examination and disposition of cases of public concern, and delayed suitors in the pursuit of justice.

"But in the interest of jurisprudence and uniformity of decisions, to use the language of the eminent jurist and statesman who had charge of the bill, provision was made under section six for such superviscion on our part as would tend to avert diversity of judgments and guard against inadvertance of conclusion in controversies involving weighty and serious matters. * * *

"But we do not regard the inquiry as to whether it was settled law of the State of Minnesota that a judgment of dismissal in a former suit, such as pleaded here, was not a bar to a second suit upon the cause of action, or whether the law in respect to the recovery by a servant against his master for injuries received in the course of his employment was properly applied on the trial in this case, as falling within the category of these

questions of such gravity and general importance as to require the review of the conclusions of the Circuit Court of Appeals in reference to them."

In Forsyth v. Hammond, 166 U. S. 506, the doctrine of the foregoing cases was reaffirmed, Mr. Justice Brewer, speaking for the court, saying, "And further that while this power is coextensive with all possible necessities and sufficient to secure to this court a final control over the litigation in all the Courts of Appeal, it is a power which will be sparingly exercised, and only when the circumstances of the case satisfy us that the importance of the question involved, the necessity of avoiding conflict between two or more Courts of Appeal or between Courts of Appeal and the Courts of a State, or some matter affecting the interest of this nation in its internal or external relations, demands such exercise."

In that case there was a sharply defined conflict between the decision of the Supreme Court of Indiana and the Circuit Court of Appeals, in that the one had declared that a certain proceeding by which certain territory was annexed to a certain municipality was legal, while the other had declared it to be illegal.

In Security Trust Company v. Black River National Bank, 187 U. S. 211, where certorari was granted, there was a clear departure by the Circuit Court of Appeals from the Statutes and decisions of the Supreme Court construing them, of the State of Minnesota with reference to the time in which claims against decedents should be presented—the latter court having ignored the State statutes and decisions construing and applying them.

(2) *The Alleged Reasons for Certorari do not make a Case Within These Rules.*

The proposition advanced by the petitioners, that the Circuit Court of Appeals failed to give them the benefit of Alabama law on an Alabama contract is earnestly controverted by the respondent. To the contrary, the decision of the Court of Appeals is a correct exposition

of the law of Alabama.—See 121 Fed. 17; 126 Fed. 456; 128 Fed. 1019.

Section 1428 of the Code of Alabama, 1896, provides that the county treasurer must, before entering upon the duties of his office, give bond in such sum as may be fixed by the court of county commissioners, "payable to the county, and conditioned as prescribed by law."

The condition prescribed by law is "faithfully to discharge the duties of such office during the time he continues therein, or discharges any of the duties thereof." —Code, Sec. 3070.

The bond is payable, conditioned and approved as prescribed by law.

Section 3087 declares the legal effect of official bonds as follows: "Every official bond is obligatory on the principal and sureties thereon—

"1. For any breach of the condition during the time the officer continues in office, or dischrges any of the duties thereof.

"2. For the faithful discharge of any duties which may be required of such officer by any law passed subsequently to the execution of such bond, although no such condition is expressed therein.

"3. For the use and benefit of every person who is injured, as well as by any wrongful act committed under color of his office, as by his failure to perform, or the improper or neglectful performance of those duties imposed by law."

Section 1429, prescribing the duties of the county treasurer, provides: "It is the duty of the county treasurer—

"1. To receive and keep the money of the county, and disburse the same according to law." * * *

"10. * * * To demand and receive all moneys due to the county, and to institute proceedings against defaulters."

Section 4 of the act authorizing the issue of the bonds, which act is set out in the record at page 106, made the duty of the county treasurer to receive the proceeds of the sale of the road and bridge bonds and disburse the same under the direction of the board of revenue, and provided that the county treasurer should "be responsi-

ble for the safe keeping of all the proceeds arising from the sale of said bonds, which may come into his hands in his official capacity, the same as for other county funds or money in his hands as such county treasurer."

The statute above quoted, making every official bond obligatory upon the principal and sureties thereon "for the faithful discharge of any duties which may be required of such officer by any law passed subsequently to the execution of such bond, although no such condition is expressed therein," has been in force many years and its validity is not open to question. The liability upon the bond of Cochran, with reference to the transaction involved in this suit, is the same as if the bond had been executed after the passage of the act providing for the sale of the road and bridge bonds.

Morrow v. Wood, 56 Ala. 1;
McKee v. Griffin, 66 Ala. 211;
Norton v. Kumpe, 121 Ala. 446.

By Section 4668 of the Code of Alabama, (Volume 2) it is provided: "Any probate judge, clerk of a court of record, register in chancery, sheriff, coroner, tax-collector, county treasurer, trustee of public schools, notary qublic, justice of the peace, constable, or other public officer, who knowingly converts to his own use, or permits another to use any of the revenues of the State, or of any county thereof, or any money paid into his office, or received by him in his official capacity, is liable to indictment, and, on conviction, must be punished if he had stolen it."

It is unquestionably the law in Alabama, as elsewhere, that the deposit of a check in a bank upon which it is drawn, to the credit of the depositor, is, in legal effect, precisely the same as if the money had been paid over the counter to the holder of the check and immediately by him returned to the bank as a general deposit.

City National Bank v. Burns, 68 Ala. 267, 275;
National Burk v. Burkhart, 100 U. S. 689;
Oddie v. National City Bank, 45 N. Y. 735;
Morse on Banks and Banking, p. 321.
Bryant v. Parks, (Ala.), 38 So.

In Alston v. State, 92 Ala. 124, it was held that where a judge of probate had received a check in payment for a license issued by him and had deposited the check in a bank to his credit in his official capacity, such a deposit was a conversion of the amount of the check and constituted a breach of his official bond. The solvency or insolvency of the bank was wholly immaterial. The court said among other things: "So far as Alston was concerned, the bank, by accepting the deposit, merely became his debtor and assumed the obligation to honor his checks to the amount so credited to him. The money of the State was thus turned over to the bank on general deposit and became a part of its funds and subject to its use as any other of its property. This use of the public money by the probate judge was without warrant of law. He had no right to convert it to his own use or permit any one else to use it. The deposit was of like effect as a loan of money. It was an unauthorized use thereof. The probate judge by that act voluntarily relinquished his custody and control of this public fund so that he could not reclaim it. When the State demands it his answer is that he no longer has it, but has a claim for the amount against an insolvent bank. In view of the statutory provisions above referred to, we think that his answer is wholly insufficient as a defense. The effect of the statutes is to make the probate judge a custodian of that money and to prohibit him from permitting another to use it."

This case is cited with approval in the late case of Mitchell v. Rice, 132 Ala. 120, where it was held that the unauthorized deposit in a bank by a register in chancery of the proceeds of land sold by him under a decree of th court "was an unlawful disposition of these proceeds," imposing liability on his official bond.

We beg to call particular attention to the cases of the United States Fidelity & Guaranty Co. v. Union Trust & Savings Co., 38 Southern Reporter,————, and Parks v. Bryant, Ib.,————, decided by the Supreme Court of Alabama on January 17, 1905. These were actions upon the official bond of the Register in Chancery for Montgomery County, to recover damages for and on account of moneys deposited by the Register to his credit as register in this same bank of Josiah Mor-

ris & Co. In each case the plaintiff had judgment and, on appeal by the defendant, the judgment was affirmed. In the case brought by the Union Trust & Savings Co. the defense was rested largely on the question of the form and sufficiency of the bond sued on. In the case brought by Bryant, in addition to the questions raised in the other case touching the form of the bond, the defendant Parks (the Register) and the guaranty company each pleaded separately a plea (numbered 3 and 4 in their respective pleas and idnetical in language) as follows: "That the sum claimed in the complaint was received in his official capacity by one V. M., Elmore, who was the predecessor of defendant Parks in the office of register in chancery of Montgomery county, Alabama; that on his retirement from said office, he gave to defendant Parks as his successor in office a check on the banking house of Josiah Morris & Co. for the money claimed in the complaint; that said Parks did not collect the said check, but had the amount named therein placed to the credit of said Parks, as register in chancery, on the books of said Josiah Morris & Co.; that shortly afterwards the said Josiah Morris & Co. suspended payment and defendant Parks has never received the money claimed in the complaint." On demurrer interposed by the plaintiffs to this plea the city court held that it presented no defense to the action and this ruling was affirmed by the Supreme Court in an opinion rendered by Mr. Justice Dowdell, *in which the decision of the Court of Appeals in this case is approvingly cited*, as follows: "The ruling of the trial court in sustaining the demurrers to pleas 3 and 4 remains only to be passed upon here. There was no error committed in sustaining the demurrers to these pleas.—City National Bank v. Burns, 68 Ala. 267, 275; Alston v. State, 92 Ala. 124; Morse on Banks & Banking, § 321; National Bank v. Burkhart, 100 U. S. 689; Oddie v. The National City Bank, 45 N. Y. 735; Montgomery County v. Cochran, 121 Fed. Rep. 17, Ib. 126 Fed. Rep. 456."
(*See Appendix to this Brief.*)

Thus it appears that, contrary to the contention of the plaintiffs in error, the Sppreme Court of Alabama has not only reaffirmed former decisions of that court upon

which the Court of Appeals relied in sustaining this action, but has actually stamped its approval upon the decision of the Court of Appeals. If there be anything further necessary to show that the decision of the Court of Appeals is in entire harmony with the law of Alabama as declared by its highest court and that the contrary opinion of Judge Jones here attempted to be set up as "the law of Alabama" is contrary to that law, we would like for counsel to point it out.

Moreover, with all proper respect to the opinion of Judge Jones, we must be permited to question its competency as evidence of "the law of Alabama" as attempted to be used in this case. If the reversed decision of the Circuit Court may be set up as the local law, against the decision of the higher court, and accepted as such by the Supreme Court, then Congress should make short work of it by providing that the decision of the Circuit Court shall be final.

Counsel for plaintiffs in error are mistaken in supposing that the 8th count of the complaint is based upon the failure of Cochran "to collect the check." The breach assigned by that count is that Cochran, as treasurer, having entered upon the duty of collecting and receiving the proceeds of the sale of the road and bridge bonds, "wrongfully and knowingly failed to collect and receive said sum," (see record, p. 34,) thus charging the negligent performance of an official duty within the meaning of subdivision 3 of section 2087 of the Code as hereinbefore set out. However, it is wholly immaterial what was contained in that count, since the jury by their special verdict (see the verdict set out in the judgment at page 103 of the record) found that Cochran received and converted the said proceeds; therefore the verdict and judgment stand upon the counts charging conversion.

While it is true in Alabama that a public officer is not authorized to receive anything but lawful money in payment or satisfaction of any debt or demand he is authorized by law to receive, it is equally true that if he does do he acts at his own peril and if injury results therefrom he is responsible on his official bond. It is

also true, as we have seen, that if he deposits the check to his credit in the bank upon which it is drawn he thereby collects the money and is liable on his bond for its conversion. It is no answer to say that he was without authority to receive the check. And it is wholly immaterial whether he received it directly from the payor or through another agency.

It is a well settled doctrine, resting upon the weightiest considerations of public policy, that neither the State nor a political subdivision thereof, is bound by the lashes or unauthorized acts of any of its public officers.

Jackson County v. Derrick, 117 Ala. 348, 365;
State v. Lott, 69 Ala. 147, 155;
State v. Brewer, 64 Ala. 287, 298.

The doctrine that a party cannot recover in a court of justice when he must found his right upon an illegal or immoral transaction, or one otherwise offensive to public policy, in which he participated, has no application here. The plaintiff county did not require the aid of an ilegal transaction, in which it participated, to support its case. The test is whether the party is "obliged to lay the foundation of his action on his own violation of the law."

Clark v. Colbert, 67 Ala. 92;
Ware v. Curry, 67 Ala. 274, 283;
Jemison v. Birmingham ets. R. Co., 125 Ala., 378, 383.

The record shows that when Cochran applied to the surety company to make his bond, the question was asked him where he would keep the money, and he answered, that he would deposit it with Josiah Morris & Company. (Record, p. 109.)

So the surety company was a party to the plan to place the money of the county in that bank. And no doubt it was further understood between them that the bank should name a deputy to perform the duties of the office, but whether so or not, the surety company (if at all material) is chargeable by law with notice of the appointment of the deputy; and both the principal and

surety are responsible for his conduct in the performance of his duties as such deputy.

9 Am. and Eng. Enc. of Law (2d ed.) pp. 390, 393, 395.

The proposition that the Supreme Court should grant the writ of certiorari because of the refusal of the Circuit Court to grant a repleader on the third trial in that court, manifestly does not call for serious consideration. The plaintiff below was satisfied with its pleading, and the defendants below had no right to demand "the making of a new series of pleadings." See 18 Enc. Pl. & Pr., pp. 489 et. seq. Moreover, the record shows that the lettered pleas which the defendants below were permitted to file on the third trial contained substantially the matters of alleged defense which were passed on by the Court of Appeals in 121 Fed. 17, and 124 Fed. 456.

The only possible result of granting the writ would be an affirmance of the judgment of the Court of Appeals—or a reversal on the ground that the defendants below led the Circuit Court into error in ordering a removal of the cause.

Whether the cause was properly or improperly removed from the State court to the Federal court, the judgment rendered upon the last trial in the Circuit Court and affirmed by the Court of Appeals is valid and binding.—See Des Moines Nav. & R. Co. v. Iowa Homestead Co., 123 U. S. 552.

Having invoked Federal jurisdiction and clung to it so long as there was possible ground to hope for its favorable exercise, the petitioners are in no position to invoke the action of the court upon that question.

While the question of jurisdiction is one which can not be waived by the parties, it is not believed that the court will lend the petitioners a helping hand to a position where they may have the benefit of a decision possibly relieving them of the consequences of their speculation upon that question.

Although complaining of the first decision of the Court of Appeals, the defendants rejected the plaintiff's

invitation, extended upon the second trial, to return to the State court. The jurisdiction having been impliedly sustained by the Court of Appeals, the Circuit Court was bound thereby upon the second trial (Aspin Mining Co. v. Billings, 150 U. S. 31; May's Executors v. Skillern's Executors, 6 Cranch, 267) but of course that could have been remedied by consent on the part of the defendants to the plaintiff's motion to remand. And when it is further known that the case was triable in the City Court without the intervention of a jury and the judgment reviewable by the Supreme Court of Alabama without any presumption in favor of its correctness, the refusal of the defendants to return to the State Court as invited upon the second trial in the Circuit Court and after the Court of Appeals had decided against them, is hard to reconcile with their present contention that the Court of Appeals failed to follow Alabama law.

The Respondent respectfully submits that in no possible view of the case does the situation call for the exercise of the power to grant cetiorari.

BRIEF ON THE MERITS.

(1) *The Scope of the Inquiry.*

If the Supreme Court should get over the question of its own jurisdiction on the writ of error, or should grant the writ of cetiorari, then to what extent will the merits of the case be considered. Is the entire case open for review, or only the questions covered by the last decision of the Court of Appeals? And is the scope of revision the same upon writ of error and upon cetiorari? Does the doctrine of "the law of the case" apply to the former decisions of the Court of Appeals as if they had been made by the Supreme Court, or will the decisions of that Court from the beginning be subjected to complete review? And does it apply alike on writ of error and upon cetiorari?

We confess ourselves at great loss to know the true answers to these questions.

In view of the fact that "the law of the case" applies in the lower courts; that the decision of the Court of Appeals is binding on the Circuit Court upon a subsequent trial; that a former decision of the Court of Appeals is binding upon that tribunal on a second writ of error, it seems inconsistent with that rule as well as depreciative of the dignity of the Court of Appeals for the Supreme Court to disregard that doctrine and put the lower court in error for doing that which it was bound to do.

In this case "the law of the case" has been made, defined and carried into judgment after three trials in the Circuit Court and three in the Court of Appeals. Upon the last trial in the Circuit Court that court simply executed the mandate of the Court of Appeals and this action was necessarily affirmed by the latter court.

It seems that the doctrine of the law of the case as applied to the interim decisions of the Court of Appeals should be here recognized and enforced in all respects as if those decisions had been made by the Supreme Court. The Supreme Court having the power to grant the writ of cetiorari at any stage of the case in the Court of Appeals—whether before or after decision by that court—the writ of cetiorari may be applied for as soon as the supposed error has intervened, without waiting for it to be echoed by the Circuit Court and again necessarily repeated by the Court of Appeals. We respectfully suggest that the observance of such a limitation on the use of the writ of cetiorari would be entirely practicable; that it would better accord with the dignity and importance of the Courts of Appeal and would tend to promote uniformity in the administration of the law—to say nothing of the saving of time and expense to litigants. We are not unmindful of the decision in the case of Panama Railroad Co. v. Napier Shipping Co., 166 U. S. 280, where, on review upon cetiorari to a Circuit Court of Appeals, a judgment of a Circuit Court which had been rendered three years before the issuance of the writ of cetiorari was directly reviewed by the Supreme Court and after that judgment had been reversed by the Court of Appeals and another judgment rendered by the Circuit Court and affirmed by the Court of Appeals. But is it not open to grave doubt whether the Circuit Court

of Appeals act, intended as it was to curtail litigation and restrict jurisdiction in the Circuit Courts and in the Supreme Court, ever contemplated that the discretionary certiorari which it substituted for the absolute writ of error should be made to reach farther back or given a greater scope than the writ of error? It would hardly be contended that upon writ of error any other judgment than that upon which it is sued out is open to review—unless it be merely interlocutory.

It seems anomalous to say that while the Court of Appeals was bound by its former decision in the particular case, the Supreme Court, on certiorari, is not so bound, Suppose the Court of Appeals should, upon a second writ of error, undertake to reverse its former decision. What would be the corrective? Would mandamus or other process lies to make that Court follow its former decision, whether right or wrong? And then would certiorari lie to test the correctness of such former decision?

Prior to the last writ of error (the third) sued out from the Circuit Court of Appeals in the case at bar, every question in the case had been settled by the former decisions of the Court of Appeals, unless it be the question of interest, that is, from what time interest should be calculated on the amount of money converted.

It will be seen by reference to page 103 of the record that the jury rendered a special verdict as follows: "We, the jury, find the issues in favor of the plaintiff; and if, in the opinion of the court, the plaintiff is entitled to interest on the amount of money converted from the time of the conversion, viz: January 8, 1901, we assess the damages of the plaintiff at one hundred and one thousand and seventeen dollars and ninety cents; but if, in the opinion of the court, the plaintiff is entitled to interest on the amount of money converted from the time of the bringing of this suit and not from the time of the conversion, we assess the damages of the plaintiff at ninety-two thousand dollars and forty-three cents; but if, in the opinion of the court, the plaintiff is entitled to no interest on the amount of money converted, we assess the damages of the plaintiff at seventy-eight thousand, four hundred and forty-four dollars and two

cents." And thereupon (p. 104) the Circuit Court, on motion of the plaintiff, rendered judgment for the largest sum mentioned in the verdict.

(2) *The Question of the Liability of the Surety for Interest on the Money Converted by the Principal.*—The Circuit Court and the Court of Appeals correctly ruled that the true measure of damages was the amount of money converted with the interest thereon from the time of the conversion to the time of the verdict.—

Bradley v. Hardin, 73 Ala. 70;
Boutwell v. Parker, 124 Ala. 341;
U. S. Fidelity ets. Co. v. Union Trust etc. Co., (Ala.) 38 So.————
State v. Lott, 69 Ala. 147, 155;
Dows v. National Exchange Bank, 91 U. S. 637;
United States v. Denvir, 106 U. S. 536;
United States v. Knowles, 106 U. S. 537;
United States v. Arnold, 1 Gall. 348, 349; affirmed 9 Cranch, 104;
Cooper v. Hill, 94 Fed. 582, 36 C. C. A. 402;
New Dunderberg Min. Co. v. Old, 97 Fed. 150, 38 C. C. A. 89;
Kavanaugh v. Taylor, 2 Ind. App. 502, 28 N. E. 553;
McCormick v. Pa. Cent. R. Co., 49 N. Y. 303, 315;
Hyde v. Stone, 7 Wend. (N. Y.) 354;
Andrews v. Durant, 18 N. Y. 496;
2 Joyce on Damages, § 1118;
3 Sutherlin on Damages, pp. 520, 521.

In State v. Lott, 69 Ala. 147, 155, BRICKELL, C. J., speaking for the court, said: "Whenever it is ascertained that at a particular time money ought to have been paid, whether in satisfaction of a debt, or as compensation for a breach of duty, or for the failure to keep a contract, interest attaches as an incident."

Bradley v. Harden, 73 Ala. 70, was a suit against the sureties of a deceased judge of probate, and was based on the alleged conversion by him of a sum of money paid to him on a decree rendered in favor of a minor distributee on the final settlement of an estate. After referring

to the statute which provided for the payment of the amount of the decree into the hands of the judge of probate, the court said: "It is insisted, however, that the sureties cannot be made liable in this action, unless there was a *demand* for the money made upon the principal. Such might be the rule in the absence of the *averment of a conversion* of the money, by appropriation to the principal's use, or otherwise. This fact, however, if true, would clearly fix the liability of the sureties, as it would constitute a breach of the principal's duties imposed by the bond. In such case there is no necessity for a demand. The purpose of a demand and refusal, in ordinary cases of bailment, is but to furnish evidence of a prior conversion, and is, of course, unnecessary when the conversion is otherwise proved.—2 Greenl. on Ev. § 644. * * * Interest is usually considered as the legitimate fruit of principal and is often allowed in the nature of damages for detention. When money is wrongfully converted by appropriation to one's own use, the amount converted, with interest, is the lowest authorized measure of damages.—Ewart v. Kerr, 2 McMullen, 141; 2 Greenl. on Ev. §§ 276, 649. The liability of the sureties in such case is clearly commensurate with that of the principal in the bond for the faithful discharge of whose duties they have solemnly bound themselves."

In Boutwell v Parker, 124 Ala. 341, 342, which was an action of trover for the conversion of certain machinery, the court said: "In trover it is a general rule, to which this case forms no exception, that where the property has a fixed value, the measure of damages is that value at the time of the conversion, with interest; but if the value has risen after the conversion the jury may at discretion take the higher value as it may be shown to exist at any time between the conversion and the trial, (citing authorities). The reason for allowing the jury to assess damages according to the increased value is to prevent any benefit to the defendant for his wrongful act. When there has been no return of the property or other special defense in reduction of damages, the discretion allowed the jury in such case does not extend to taking a value lower than that applying at the time of the conversion."

In the case of United States Fidelity & Guaranty Co. v. Union Trust & Savings Co., decided January 17, 1905, and reported in 38 Southern Reporter, page ..., which suit was on the bond of a Register in Chancery to recover for the conversion of money by the Register in that he deposited the money to his credit in the bank of Josiah Morris & Co., the Supreme Court of Alabama sustained the action and *adjudged interest to the plaintiff from the time of the deposit.*

In Davis v. National Exchange Bank, 91 U. S. 618, which was an action of trover for the conversion of wheat, the court held that upon the refusal of the party in possession of the wheat to deliver it to the owner, when thereunto requested, the owner was entitled to recover the value thereof, with interest from the date of such refusal. There was no conversion prior to such refusal.

In United States v. Denvir, 106 U. S. 536, and United States v. Knowles, 106 U. S. 537, the right to interest in case of a conversion was clearly recognized, the court saying that if the disbursing officer had not converted the money to his own use he would not be chargeable with interest until he had failed in some duty to pay or account for the money.

In Cooper v. Hill, 94 Fed. 582, 36 C. C. A. 402, the Circuit Court of Appeals for the Eighth Circuit held that when the directors and officers of a bank had misappropriated its funds they were liable for interest on the amount from the date of the misappropriation, as damages.

And in New Dunderberg Min. Co. v. Old, 97 Fed. 150, 38 C. C. A. 89, the same court held that in an action for mining and converting ore the plaintiff was entitled to recover the value of the ore with interest thereon from the time of the conversion; and that it was immaterial whether the interest was given as interest or as damages.

Much stress was laid by counsel for plaintiffs in error on the decision in Lewis v. Lee County, 73 Ala. 148, where it was held that interest upon the money sued for did not begin to run until there was some default in connection with it on the part of the defendant treasurer. Upon examination it will be found that the gravamen of the complaint was that Lewis, the treasurer, had failed to pay over the money of the county to his successor. Lewis offered to testify upon the trial that he had not used the money or permitted another to use it, and the Supreme Court held that such testimony was properly excluded for the reason that he was not charged with converting the money, only with failing to pay over to his successor. The default, therefore, being the failure to pay over to his successor, the court correctly held that interest did not begin to run until there was a successor to whom the money could be paid.

The other authorities relied on by counsel for plaintiffs in error in support of their contention as to the time interest began to run will be found to be unlike the case at bar, in that they were not based on the alleged conversion of money at a specified date prior to the beginning of the suit. The doctrine that interest runs from the date of default pervades all of them and to that extent only are they applicable here. The important question always is, when did the default occur? The answer depends upon the facts of the particular case. The time of the default being fixed, the rule is without exception that interest runs from such time. Here, the default occurred on the 8th day of January, 1901, as was found by the verdict of the jury. The obligation was immediately upon the surety to make good the default to the extent of the penalty. For every day thereafter he failed to do so the law charges him with interest as damages.

And the lower courts correctly ruled that such interest was recoverable even though it swell the damages to an amount beyond the penal sum mentioned in the bond.

Blewett v. Front Street Cable Co., 51 Fed. 625; 2 C. C. A., 415;

The "Wanata," 95 U. S. 600;

Perit v. Wallis, 2 Dallas, 252;
Ives v. Merchants' Bank, 12 How. 159;
Tyson v. Sanderson, 45 Ala. 364;
Washington County Ins. Co. v. Colton, 26 Ct. 42;
Lewis v. Dwight, 10 Ct. 95;
Carter v. Carter, 4 Day (Ct.), 30; 4 Am. Dec. 177;
Holmes v. Standard Oil Co., 183 Ill. 70; 55 N. E. 647;
Burchfield v. Haffey, 34 Kan. 42; 7 Pac. 548;
Carter v. Thorn, 18 B. Mon. (Ky.), 613;
Natchitoches v. Redmond, 28 La. Ann. 274;
Wyman v. Robinson, 73 Me. 384; 40 Am. Rep. 360;
State v. Wayman, 2 Gill & J. (Md.), 254;
Harris v. Clap, 1 Mass. 308; 2 Am. Dec. 27;
Warner v. Thurlo, 15 Mass. 154;
Bank of Brighton v. Smith, 94 Mass. 243; 90 Am. Dec. 144;
Leighton v. Brown, 98 Mass. 515;
Mullen v. Morris, 43 Neb. 596; 62 N. W. 74;
Probate Judge v. Haydock, 8 N. H. 491;
Gloucester City v. Eschbach, 54 N. J. L. 150; 23 Atl. 360;
Robbins v. Long, 16 N. J. E. 59;
Mower v. Kip, 6 Paige Ch. 88; 3 N. J. Ch. 910; 28 Am. Dec. 748;
Steinbock v. Evans, 122 N. Y. 551; 25 N. E. 647;
Beer v. Shannon, 73 N. Y. 292;
Brainard v. Jones, 18 N. Y. 35;
Lyon v. Clark, 8 N. Y. 148;
Smedes v. Hooghtaling, 3 Caines (N. Y.), 48; 2 Am. Dec. 250;
Graham v. Bickham, 3 Yeates (Pa.), 32; 1 Am. Dec. 328;
Walcott v. Harris, 1 R. I. 404;
Smith v. Macon, 1 Hill Eq. (S. C.), 339;
Grand Lodge v. Cleghorn, 20 Tex. Civ. App. 134; 48 S. W. 750;
Baker v. Morris, 10 Leigh (Va.), 294;
State v. Purcell, 31 W. Va. 44; 5 S. E. 301;
Perry v. Horn, 22 W. Va., 381;
5 Cyc. L. & P., p. 851;
1 Sutherlin on Damages, pp. 598-9;
Stearns on Suretyship, § 155;
Note to Fraser v. Little, 87 Am. Dec. 745-755.

The foregoing authorities establish beyond doubt the correctness of the observation of Circuit Judge Gilbert, concurred in by Circuit Judge, now Mr. Justice McKenna, in Blewett v. Front Street Cable Ry. Co., 51 Fed. 625; 2. S. C. A. 415, viz.: "The weight of American authority is in favor of allowing interest beyond the penalty from and after the date of the breach, in all cases where the damages equal or exceed the penal sum. It is allowed, not as additional damages for the breach, but as damages for wrongfully withholding a payment that has become due."

The philosophy of the rule is clearly set forth by Peters, J., speaking for the Supreme Judicial Court of Maine, in Wyman v. Robinson, 73 Me. 384, 387: "It is commonly said that the damages cannot exceed the penalty of a bond. Rightly understood, the statement is true. But what is the penalty in a bond for the payment of damages? It is the amount which the obligor agreed to pay, if the whole penalty be needed for that purpose, for the damages sustained by the obligee by a breach of the bond, the amount to be paid as soon as the breach occurs. The obligee is to have the penalty at a particular and definite time. Immediately upon a breach of the bond the penalty is due to him. If he gets it then, he gets what the contract provides; if he gets it later, he gets less than what the contract provides. If, then, the penalty be paid after the breach, interest should be added for the detention of the penalty, to make it equivalent to a payment at the date of the breach. After the penalty is forfeited, it becomes a debt due. The sureties then stand in the relation of principals to the obligee, owing him so much money then due. To ascertain the precise sum may require calculation,—but that is certain which may be made certain. The rule common to contracts generally applies, that where money is due and there is default in payment, interest is to be added as damages. The defendants should pay damages for detaining damages which they bound themselves to pay at a prior date. The penalty of the bond is payable because the principal did not fulfill his obligation; the interest is the penalty upon the sureties for not fulfilling theirs."

It is well known, and the reasons therefor are obvious, that in the case of an administrator, executor or guardian, the judicial ascertainment of a liability against the trustee fixes the liability of the surety on his bond. —See Fretwell v. McLemore, 52 Ala. 124, 136.

In Tyson v. Sanderson, 45 Ala. 364, the Supreme Court recognized the principle we contend for, in holding that "the sureties on a guardian's bond are not liable for a sum of money, by way of damages for the breach of the bond, larger than the penalty of the bond and the interest on such penalty after breach of the bond." The court cited section 2771 of the Revised Code, which was as follows: "In all actions which are brought on any penal bond, for the payment of money, whenever the plaintiff recovers, judgment must be entered for no more than principal and interest due on the bond."

This statute has been brought forward and is now condensed into the italicised portion of section 3289 of the Code of Alabama, 1896, as follows:

"In actions upon penal bonds or other writings, for the non-performance of any covenant or agreement contained therein, the plaintiff may assign such breaches as he may deem proper, and verdict and judgment may be rendered for the plaintiff for such of the breaches as he may prove; and if judgment be rendered for the plaintiff by default or nil dicit, a writ of inquiry of damages must be awarded. *Judgment shall in no case exceed principal and interest due on the instrument.*"

We quote sections 2626, 2627, 2628, and 2629 of the Code of Alabama, 1896, relating to interest, as follows:

"2626. *Rate of interest fixed at eight per cent.*—The rate of interest upon the loan or forbearance of money, goods, or things in action, is eight dollars upon one hundred dollars for one year; and at that rate for a greater or less sum, or a longer or shorter time.

"2627. *Interest accrues on breach of contract.*—All contracts, express or implied, for the payment of money, or other thing, or for the performance of any act or duty, bear interest from the day such money, or thing, estimating it at its money value, should have been paid, or such act, estimating the compensation therefor in money, performed.

"2628. *Interest on Judgments.*—Judgments and decrees for the payment of money, other than costs, bear interest from the day of rendition.

"2629. *Partial payments applied to interest.*—When partial payments are made, the interest due is first to be paid, and the balance applied to the payment of the principal."

The record shows that the penalty for the treasurer's bond was $120,000.00 The record further shows (p. 107), that the surety paid a judgment for the general fund, which included $32,221.80 of principal. The special verdict (p. 103) shows that the amount of principal included in the judgment now appealed from is $78,444.02. These two sums aggregate the sum of $110,665.82. Therefore, the penalty of the bond is not exhausted by nearly ten thousand dollars.

Payments made by Cochran cannot be used to reduce the penalty of the bond.

Sessions v. Pintard, 18 How. 108.

(3.) *If all former action is subject to review, then the jurisdictional question necessarily arises for consideration.*

If the Supreme Court shall determine to review the action of the Circuit Court and the Court of Appeals from the beginning, then the question of the jurisdiction of the Circuit Court must necessarily be considered. In that event we would like to yield to counsel for plaintiffs in error the office of sustaining the jurisdiction which they invoked. For while we would regret to be deprived, temporarily thought it be, of the fruits of several years of labor and toil, we cannot consistently from any standpoint assume the defense of a position which we have heretofore in all due season must earnestly assailed as erroneous. A motion to remand was overruled at the first trial and that action was impliedly sanctioned by the Court of Appeals on the first writ of error. The motion was renewed on the second trial, thus giving the defendants below an opportunity to consent to a return of the case to the State court where they would undoubtedly get the benefit of "Alabama law," but they declined the invitation.

Counsel for plaintiffs in error, in their brief against the motion to dismiss the writ of error, have brought forward authorities and arguments, with some additions which they presented in the Court of Appeals in support of the jurisdiction. In order that the other side of the question may be somewhat presented to the Court, we will endeavor to show by the citation of authorities that the case at bar was not originally removable to the Circuit Court of the United States.

Two propositions on the jurisdictional question are submitted:

1. One of the defendants being a citizen of the same State as the plaintiff, and there being no separable controversy, the act of 1887-8 does not authorize the removal of the cause from the State court to the Circuit Court of the United States by the non-resident defendant on the ground of prejudice or local influence.

II. If such had been the intention of said act, it would have been unconstitutional.

I. The Constitution of the United States declares that "the judicial power of the United States shall be vested in one Supreme Court, and in such inferior courts as the Congress may from time to time ordain and establish;" that "the judicial power shall extend to all cases, in law and equity, arising under this Constitution, the laws of the United States and treaties made, or which shall be made under their authority; to all cases affecting ambassadors, other public ministers and consuls; to all cases of admiralty and maritime jurisdiction; to controversies to which the United States shall be a party; to controversies between two or more States; between a State and citizens of another State; between citizens of different States; between citizens of the same State claiming lands under grants of different States, and between a State, or a citizen thereof, and foreign States, citizens or subjects. In all cases affecting ambassadors, other public ministers and consuls, and those in which a State shall be a party, the Supreme Court shall have original jurisdiction. In all other cases before mentioned, the Supreme Court shall have appellate jurisdiction, both as to law and fact, with such exceptions and under such regulations as the Congress may make." Art. III, § 2.

Congress is authorized "to constitute tribunals inferior to the Supreme Court," and "to make all laws which shall be necessary and proper for carrying into execution" the powers delegated by the Constitution.—Art. I, § 7, cls. 9, 18.

The Supreme Court derives its original jurisdiction solely from the Constitution, and Congress can neither enlarge nor restrict it.

Marbury v. Madison, 1 Cranch, 137, 175;
California v. Southern Pac. Co., 157 U. S., 229, 261.

The jurisdiction of the Circuit Courts is such as Congress may confer upon them within the limits of the Constitution. It can not exceed such limits.

United States v. Hudson, 7 Cranch, 32;
Sheldon v. Sill, 8 How. 441;
Plaquemines Fruit Co. v. Henderson, 170 U. S. 511, 521.

The Several Judiciary Acts.

The first judiciary act, passed in 1789, provided, in section 11:

"That the circuit courts shall have original cognizance, concurrent with the courts of the several States, where the matter in dispute exceeds, exclusive of costs, of all suits of a civil nature at common law or in equity, the sum or value of five hundred dollars, and the United States are plaintiffs, or petitioners; or an alien is a party, or the suit is between citizens of the State where the suit is brought and a citizen of another State."

And section 12 of said act of 1789 provided:

"That if any suit be commenced in any State court against an alien, or by a citizen of the State in which the suit is brought against a citizen of another State, and the matter in dispute exceeds the aforesaid sum or value of five hundred dollars exclusive of costs, to be made to appear to the satisfaction of the court, and the defendant shall, at the time of entering his appearance in such court, file a petition for the removal of the cause," the same might be removed to the Circuit Court of the United States.—1 Stat. 73.

The act of 1866 provided for the removal of separable part of a suit at the instance of a non-resident defendant, who was joined in the suit with a resident defendant, by petition to the State court at any time before the trial or final hearing of the cause.—14 Stat. 306.

The act of 1867 provided:

"Where a suit is now pending or may hereafter be brought in any State court, in which there is a controversy between a citizen of the State in which the suit is brought and a citizen of another State, and the matter in dispute exceeds the sum of five hundred dollars, exclusive of costs, such citizen of another State, whether he be plaintiff or defendant, if he will make and file in such State court an affidavit stating that he has reason to believe and does believe, that from prejudice or local influence, he will not be able to obtain justice in such State court, may at any time before the final hearing or trial of the suit, file a petition in such State court for the removal of the suit into the next Circuit Court of the United States," etc.—14 Stat. 558.

The acts of 1789, 1866, and 1867 were substantially reenacted in section 629 and 639 of the Revised Statutes of 1874, the act of 1867 constituting sub-section 3 of section 639, as follows:

"Third. When a suit is between a citizen of the State in which it is brought and a citizen of another State, it may be removed on the petition of the latter, whether he be plaintiff or defendant, filed at any time before the trial or final hearing of the suit, if, before or at the time of filing said petition, he makes and files in said State court an affidavit, stating that he has reason to believe and does believe that, from prejudice or local influence, he will not be able to obtain justice in such State court."

The act of 1875 provided in section 1:

"That the circuit courts of the United States shall have original cognizance, concurrent with the courts of the several States, of all suits of a civil nature at common law or in equity, where the matter in dispute exceeds, exclusive of costs, the sum or value of five hun-

dred dollars, and arising under the constitution or laws of the United States, or treaties made, or which shall be made, under their authority, or in which the United States are plaintiffs or petitioners or in which there shall be a controversy between citizens of different States, or a controversy between citizens of the same State claiming lands under grants of different States, or a controversy between citizens of a State and foreign States, citizens or subjects."—19 Stat. 470.

Section 2 of said act of 1875 provided:

"That any suit of a civil nature, at law or in equity, now pending or hereafter brought in any State court where the matter in dispute exceeds, exclusive of costs, the sum or value of five hundred dollars and " (describing them as in the preceding section) "either party may remove said suit into the Circuit Court of the United States for the proper district. And when in any suit mentioned in this section there shall be a controversy which is wholly between citizens of different States, and which can be fully determined as between them, then either one or more of the plaintiffs or defendants actually interested in such controversy may remove such suit into the Circuit Court of the United States for the proper district."—18 Stat. 470.

Section 3 of said act of 1875 provided:

"That whenever either party, or any one or more of the plaintiffs or defendants entitled to remove any suit mentioned in the next preceding section shall desire to remove such suit from a State court to the Circuit Court of the United States, he or they may make and file a petition in such State court before or at the time at which said cause could be first tried and before the trial thereof."—18 Stat. 470.

Said act of 1875 contained no provision for removal on the ground of prejudice or local influence, and clause 3 of section 639 was not repealed thereby.

Hanrick v. Hanrick, 153 U. S. 192, 197;
Fisk v. Henarie, 142 U. S. 459, 466.

The act of 1887, as corrected by the act of 1888, provides in section 1:

"That the circuit courts of the United States shall have original cognizance, concurrent with the courts of the several States, of all suits of a civil nature, at common law or in equity, where the matter in dispute exceeds, exclusive of interest and costs, the sum or value of two thousand dollars, and arising under the Constitution or laws of the United States, or treaties made, or which may be made, under their authority, or in which the United States are plaintiffs or petitioners, or in which there shall be a controversy between citizens of different States, in which the matter in dispute exceeds, exclusive of interest and costs, the sum or value aforesaid, or a controversy between citizens of the same State claiming lands under grants of different States, or a controversy between citizens of a State and foreign States, citizens or subjects, in which the matter in dispute exceeds, exclusive of interest and costs, the sum or value aforesaid," etc.—25 Stat. 434.

And said act of 1887-1888 provides, in section 2, for the removal of causes, as follows:

I. "That any suit of a civil nature, at law or in equity, arising under the Constitution or laws of the United States, or treaties made, or which shall be made, under their authority, of which the circuit courts of the United States are given original jurisdiction by the preceding section, which may now be pending, or which may hereafter be brought, in any State court, may be removed by the defendant or defendants therein to the Circuit Court of the United States for the proper district."

II. "Any other suit of a civil nature, at law, or in equity, of which the circuit courts of the United States are given jurisdiction by the preceding section, and which are now pending, or which may hereafter be brought, in any State court, may be removed into the Circuit Court of the United States for the proper district by the defendant or defendants therein, being nonresidents of that State."

III. "And when in any suit mentioned in this section there shall be a controversy which is wholly between citizens of different States and which can be fully determined as between them, then either one or more of the

defendants actually interested in such controversy may remove said suit into the Circuit Court of the United States for the proper district."

IV. "And where a suit is now pending, or may hereafter be brought, in any State court, in which there is a controversy between a citizen of the State in which the suit is brought and a citizen of another State, any defendant, being such citizen of another State, may remove such suit into the Circuit Court of the United States for the proper district, at any time before the trial thereof, when it may be made to appear to said Circuit Court that from prejudice or local influence he will not be able to obtain justice in such State court, or in any other State court to which the said defendant may, under the laws of the State, have the right, on account of such prejudice or local influence, to remove said cause."

"*Provided*, That if it further appear that said suit can be fully and justly determined as to the other defendants in the State courts, without being affected by such prejudice or local influence, and that no party to the suit will be prejudiced by a separation of the parties, said Circuit Court may direct the suit to be remanded, so far as relates to such other defendants, to the State court, to be proceeded with therein."—25 Stat. 434.

Section 3 of said act of 1887-88 provides that in the three cases first mentioned in section 2, above quoted, the petition for removal must be filed in the State court at the time or any time before the defendant is required by the laws of the State to plead to or answer the declaration or complaint.—25 Stat. 434.

Each of said acts of 1789, 1875, and 1887-88, as well as the Revised Statutes, contained provisions denying original jurisdiction to the circuit courts of any suit by an assignee to recover the contents of certain choses in action, unless suit might have been brought thereon if no assignment had been made; and other provisions not material here.

In Hanrick v. Hanrick, 153 U. S. 192, 195, Mr. Justice Gray, speaking for the court, clearly and succinctly summarizes the removal acts prior to 1887, shows the construction placed upon them by the court and points

out some of the changes made by the act of 1887-8, and, as to the last act, observes: "Whether this act permits one or two or more defendants to remove any case which he could not have removed under earlier statutes is a question upon which there have been conflicting decisions in the circuit courts, and upon which we are not now required to express a definitive opinion."

A similar observation is made by the Chief Justice, delivering the opinion of the court, in California v. Southern Pacific Co., 157 U. S. 229, 260.

The requisite diverse citizenship precludes a common citizenship of opposing parties.

The Supreme Court at an early day took the position, which it has at all times maintained, that when the jurisdiction was dependent upon the citizenship of the parties, the record must affirmatively show that the party plaintiff and the party defendant were of diverse citizenship. Many causes were stricken from the docket, or reversed, where the record in this respect was defective, as in Bingham v. Cabot, 4 Dall. 382; Turner v. Enrille, 4 Dall. 7; Turner v. Bank of North America, 4 Dall. 8; Mossman v. Higginson, 4 Dall. 12; Wood v. Wagnon, 2 Cranch. 9; Dred Scott v. Sandford, 19 How. 402; Philadelphia, etc., Co. v. Quigley, 21 How. 216; Brown v. Keene, 8 Peters, 115; Coal Co. v. Blatchford, 11 Wall. 172; Continental Ins. Co. v. Rhoads, 119 U. S. 237, 239; Peper v. Fordyce, 119 U. S. 469; Everhart v. Huntsville College, 120 U. S. 223; Mexican Central Ry. v. Pinkney, 149 U. S. 194.

In Strawbridge v. Curtiss, 3 Cranch, 267, some of the complainants and some of the defendants were citizens of Massachusetts, while the defendant Curtiss was a citizen of Vermont. The court, speaking through Marshall, C. J., said:

"The words of the act of Congress are, 'where an alien is a party; or the suit is between a citizen of the State where the suit is brought and a citizen of another State.' The court understands these expressions to mean that each distinct interest should be represented by persons, all of whom are competent to sue, or may be sued, in

the Federal courts. That is, that when the interest is joint, each of the persons concerned in that interest must be competent to use or liable to be sued in those courts."

In New Orleans v. Winter, 1 Wheat. 91, the same eminent jurist, speaking for the court, applied the rule laid down in Strawbridge v. Curtiss to the case of joint plaintiffs, one of whom was incapable of suing alone in the Circuit Court, and held that the Circuit Court had no jurisdiction of the cause.

In Coal Co. v. Blatchford, 11 Wall. 172, 174, Mr. Justice Field, for the court, referring to the three classes of cases mentioned in the act of 1789, viz: 1st, when the United States are plaintiffs or petitioners; 2nd, when an alien is a party; and, 3rd, when the suit is between a citizen of the State where the suit is brought and a citizen of another State, said: "In the last two classes the designation of the party, plaintiff or defendant, is in the singular number, but the designation is intended to embrace all the persons who are on one side, however numreous, so that each distinct interest must be represented by persons, all of whom are entitled to sue, or are liable to be sued, in the Federal courts.—Strawbridge v. Curtiss, 3 Cranch. 267. In other words, if there are several co-plaintiffs, the intention of the act is that each plaintiff must be competent to sue, and, if there are several co-defendants, each defendant must be liable to be sued, or the jurisdiction cannot be entertained."

In the case of the Sewing Machine Companies, 18 Wall. 553, 574, which involved a construction of the local prejudice act of 1867, the opinion of the court, by Mr. Justice Miller, approved and applied to that act the definition of the phrase, "the suit is between a citizen of the State in which the suit is brought and a citizen of another State," as given by Marshall, C. J., in Strawbridge v. Curtiss, and remarked: "Repeated decisions have since been made by this court and many other courts, State and Federal, to the same effect."

In Peninsular Iron Co. v. Stone, 121 U. S. 631, a case arising under the act of 1875, a bill in equity was

filed in a Federal court in Iowa by citizens of Michigan and Ohio against citizens of Iowa, New York and Illinois and also against a citizen of Ohio. The court, Chief Justice Waite delivering the opinion, approved the rule of construction laid down in Strawbridge v. Curtiss, 3 Cranch. 267, and New Orleans v. Winter, 1 Wheat. 91, and held that inasmuch as there was but a single cause of action and there were citizens of Ohio on one side and a citizen of Ohio on the other side, with interests so conflicting that the relief prayed could not be had without keeping them on opposite sides, the Circuit Court was without jurisdiction; and upon that ground the bill was dismissed.

In Smith v. Lyon, 133 U. S. 315, 317, a case arising under the act of 1887-8, two plaintiffs, citizens of Missouri and Arkansas, respectively, brought an original suit in a Federal court in Missouri, against a citizen of Texas. The suit was dismissed by the Circuit Court for want of jurisdiction, and the judgment was affirmed. In the opinion of the court, rendered by Mr. Justice Miller, it is said:

"In the case before us, one of the plaintiffs is a citizen of the State where the suit is brought, namely, the State of Missouri, and the defendant is a citizen of the State of Texas. But one of the plaintiffs is a citizen of the State of Arkansas. The suit, so far as he is concerned, is not brought in the State of which he is a citizen. Neither as plaintiff nor as defendant is he a citizen of the district in which the suit is brought. The argument in support of the error assigned is that it is sufficient if the suit is brought in a State where one of the defendants or one of the plaintiffs is a citizen. This would be true if there were but one plaintiff or one defendant. But the statute makes no provision, in terms, for the case of two defendants or two plaintiffs who are citizens of different States. In the present case, there being two plaintiffs, citizens of different States, there does not seem to be, in the language of the statute, any provision that both plaintiffs may unite in one suit in a State of which either of them is a citizen." And, after referring to the judiciary act of 1789 and quoting with approval the construction placed upon it in Strawbridge v. Curtiss, says:

"This construction has been adhered to from that day to this, and, although the statutes have modified the jurisdiction of the court as regards the amount in controversy and in many other particulars, the language construed in Strawbridge v. Curtiss has been found in all of them." And after referring to the revision of the statutes of 1874 and the act of 1875 and coming down to the act of 1887-8, the opinion proceeds:

"During this period, and since the case of Strawbridge v. Curtiss, this jurisdictional clause has been frequently considered by this court, and that case has been followed . In the case of New Orleans v. Winter, 1 Wheat. 91, the same question arose, and was decided in the same way. In the case of Coal Company v. Blatchford, 11 Wall. 172, Mr. Justice Field, referring to these decisions, states the effect of them in the following language: 'In other words, if there are several co-plaintiffs, the intention of the act is that each plaintiff must be competent to sue, and if there are several co-defendants, each defendant must be liable to be sued, or the jurisdiction cannot be entertained."

"The question was very fully considered in the case of the Sewing Machine Companies, 18 Wall. 553, where the same proposition is stated in almost identical language. And in the case of Peninsular Iron Company v. Stone, 121 U. S. 631, the Chief Justice reviews all the cases and reaffirms the doctrine as applicable to cases arising under the act of 1875." The opinion concludes: "We do not think, in the light of this long continued construction of the statute by this court during a period of nearly a hundred years, in which the statute has been the subject of renewed legislative consideration and of many changes, it has always retained the language which was construed in the case of Strawbridge v. Curtiss, that we are at liberty to give that language a new meaning, when it is used in reference to the same subject matter. It is not readily to be conceived that the Congress of the United States in a statute mainly designed for the purpose of restricting the jurisdiction of the Circuit Courts of the United States, using language which has been construed in a uniform manner for over ninety years by this court, intended that that language

should be given a construction which would enlarge the jurisdiction of those courts, and which would be directly contrary to that heretofore placed upon it by this court." (133 U. S., 317-320.)

Strawbridge v. Curtiss, and New Orleans v. Winter, are approved and their principles applied in many subsequent cases, including the late case of Hooe v. Jamieson, 166 U. S. 395, 397, and Florida, etc. Railroad v. Bell, 176 U. S. 321, 332, 333; the one case holding that a citizen of the District of Columbia could not maintain an action in a Federal court in Wisconsin against a citizen of that State, even though a competent person be joined with him as co-plaintiff, the other holding that the Federal Court in Florida was without jurisdiction on ground of diverse citizenship of a suit by citizens of Florida and Texas as co-plaintiffs, against citizens of Florida as defendant.s

The phrase in the local prejudice act of 1867, "a suit * * * in which there is a controversy between a citizen of the State in which the suit is brought and a citizen of another State," was construed to have the same meaning as the shorter description in the act of 1789, of "a suit between" such parties; and it was held "that each term implied a proceeding in a court of justice by a party plaintiff against a party defendant; and consequently that all the defendants must be citizens of other States from that of any of the plaintiffs, and that one of several defendants could not remove the suit."

Hanrick v. Hanrick, 153 U. S. 192, 195;
Case of the Sewing Machine Companies, 18 Wall. 553, 585;
Vannevar v. Bryant, 21 Wall. 41.

The words of the act of 1867, "in which there is a controversy," were omitted from clause 3 of section 639 of the Revised Statutes, thereby returning to the shorter description contained in the act of 1789, "a suit between a citizen of the State, in which it is brought and a citizen of another State," "and was likewise held to require that all the necessary parties on one side of the suit should be citizens of different States from those on the other, and not to permit a removal because of a separ-

ate controversy between one of the defendants and the plaintiff."

Hanrick v. Hanrick, 153 U. S. 192, 196;
Myers v. Swann, 107 U. S. 546;
American Bible Society v. Price, 110 U. S. 61;
Cambria Iron Co. v. Ashburn, 118 U. S. 54;
Hancock v. Holbrook, 119 U. S. 586;
Young v. Parker, 132 U. S. 267, 270, 271.

Under the provisions of the act of 1875 for the removal of "a controversy which is wholly between citizens of different States," it was held "that the whole subject matter of the suit must be capable of being finally determined between them, and complete relief afforded as to the separate cause of action, without the presence of other persons originally made parties to the suit; and that when there was but one indivisible controversy between the plaintiffs and the defendants, as in the case of a suit for partition, the suit could not be removed by one of several plaintiffs or defendants."

Hanrick v. Hanrick, 153 U. S. 192, 196;
Blake v. McKim, 103 U. S. 336;
Torrence v. Shedd, 144 U. S. 527;
Ballaire v. Baltimore & Ohio Railroad, 146 U. S. 117;
Wilson v. Oswego Township, 151 U. S. 56;
Merchants' Cotton Press Co. v. Ins. Co. of North America, 151 U. S. 368, 385.

We have here no separable controversy.

In Torrence v. Shedd, 144 U. S. 527, 530, Mr. Justice Gray, speaking for the court, says: "As this court has repeatedly affirmed, not only in cases of joint contracts, but in actions for torts, which might have been brought against all or against any of the defendants, 'separate answers by the several defendants sued on joint causes of action, may present different questions for determination, but they do not necessarily divide the suit into separate controversies. A defendant has no right to say that an action shall be several which a plaintiff elects to make joint. A separate defense may defeat a joint recovery, but it cannot deprive a plaintiff of his right to prosecute his own suit to final determination in his

own way. The cause of action is the subject matter of the controversy, and that is for all the purposes of the suit, whatever the plaintiff declares it to be in his pleadings.' Louisville & Nashville Railroad Co. v. Ide, 114 U. S. 52, 56; Pirie v. Tvedt, 115 U. S. 41, 43; Sloane v. Anderson, 141 U. S. 275; Little v. Giles, 118 U. S. 596, 601, 602; Thorn Wire Hedge Co. v. Fuller, 122 U. S. 535." To the same effect, see Wilson v. Oswego Township, 151 U. S. 56, 66; Chicago, etc. Rv. Co. v. Martin, 178 U. S. 245, 248; Chesapeake & Ohio Ry. Co. v. Dixon, 179 U. S. 131, 138.

In Western Union Telegraph Co. v. Brown, 32 Fed. 367, a case involving the construction of the present removal statute, Mr. Justice Brewer, after a full consideration of the authorities, held that in an action against the principal and his sureties on a penal bond conditioned for the proper performance by the principal of his duties as telegraph messenger, the only relief sought being a money judgment against all the defendants, "there is, for the purpose of removal, but a single controversy in the case."

To the same effect—that in a suit on a penal bond against the principal and surety there is no separable controversy—are the cases of Mutual Reserve Life Fund Association v. Farmer, 77 Fed. 929, 23 C. C. A. 574; and Deere, Wells & Co. v. Chcicago, etc. R. Co., 85 Fed. 876, 881.

Whether the principal, Cochran, is a man of small or large means is wholly immaterial so far as the question of jurisdiction is concerned. The plaintiff has the right to sue him and obtain judgment against him, and has the right to sue him and his surety and obtain judgment against both of them; and it cannot be objected to the suit or made a ground for removal of the cause, that Cochran is "practically financially irresponsible," and "therefore practically only a nominal party to the suit and that (the bond company) would be obliged to meet practically the whole claim, should judgment be recovered against the defendants."

It does not matter that the plaintiff might have brought separate suits against the defendants, under section 39 of the Code of Alabama, 1896, providing that "when two or more persons are jointly bound by judgment, bond, covenant or promise in writing of any description whatsoever, the obligation or promise is in law several as well as joint."

The right of Removal is Limited to Causes of Which the Circuit Courts of the United States are Given Original Jurisdiction.

While it is doubtless true that Congress may, within constitutional limits, provide for the removal of causes of which the circuit courts are not clothed with original jurisdiction, it has not done so in the act under consideration. On the contrary, the right of removal is expressly limited to cases of which the circuit courts are given original jurisdiction by section 1.

In re Pennsylvania Co., 137 U. S. 451, 454;
Mexican National Railroad Co. v. Davidson, 157 U. U. 201, 208;
Tennessee v. Union & Planters' Bank, 152 U. S. 454, 461;
Texas & Pacific Ry. Co. v. Cody, 166 U. S. 606, 609;
Arkansas v. Kansas, etc. Co., 183 U. S. 185, 189, 190
Minnesota v. Northern Securities Co., 194 U. S. 48, 63;
Madisonville Traction Co. v. St. Bernard Mining Co., Oct. Term, 1904 (Adv. sheets, 251), 196 U. S.
Reed v. Reed, 31 Fed. 49, 51;
Laird v. Indemnity Co., 44 Fed. 712;
Dey et al. v. Chicago, etc. Co., 45 Fed. 82;
Anderson v. Bowers, 43 Fed. 321;
Terre Haute v. Evansville, etc. Co., 106 Fed. 545;
Campbell v. Milliken, 119 Fed. 982;
Weldon v. Fritzlen, 128 Fed. 608.

In Mexican National Railroad v. Davidson, 157 U. S. 201, 208, Mr. Chief Justice Fuller, speaking for the court, after reference to the fact that under the acts prior to the act of 1887, the restriction of the original jurisdiction of the Circuit Court in respect to suits by

an assignee, whose assignor could not have sued in that court, did not apply to a suit removed from a State court, said:

"But the second section of the act of 1887 (as corrected in 1888) contained a radical difference from section 12 of that act of 1789 and section 2 of the act of 1875 in confining the suits which might be removed to those 'of which the Circuit Courts of the United States are given original jurisdiction by the preceding section. * * * This change was made in accordance with that intention to restrict the jurisdiction of the Circuit Courts, which had been so often recognized by this court. Smith v. Lyon, 133 U. S. 315, 319; In re Pennsylvania Company, 137 U. S. 451, 454; Fisk v. Henarie, 142 U. S. 459, 467; Shaw v. Qlincey Mining Company, 145 U. S. 444; Hanrick v. Hanrick, 153 U. S. 192."

"We must hold, therefore, as has indeed already been ruled, Tennessee v. Union & Planters' Bank, 152 U. S. 454, 461, that the jurisdiction of the Circuit Courts on removal by the defendant, under this section, is limited to such suits as might have been brought in that court by the plaintiff under the first section. The question is a question of jurisdiction as such and cannot be waived. Capron v. Van Noorden, 2 Cranch, 126; Mansfield Railway Co. v. Swan, 111 U. S. 379; Metcalf v. Watertown, 128 U. S. 586. It is true that by the first section, where the jurisdiction is founded on diversity of citizenship, suit is to be brought 'only in the district of the residence of the plaintiff or the defendant,' and this restriction is a personal privilege of the defendant, and may be waived by him.—St. Louis & San Francisco Railway v. McBride, 141 U. S. 127. Section 2, however, refers to the first part of section 1 by which jurisdiction is conferred, and not to the clause relating to the district in which suit may be brought.—McCormick Machine Co. v. Walthers, 134 U. S. 41."

In re Pennsylvania Company, 137 U. S. 451, a citizen of Connecticut had, in 1889, brought suit in a court of that State against the Pennsylvania Company, a corporation of Pennsylvania, to recover the sum of $500, and on petition of that corporation the suit was removed to the Federal Court under the local prejudice clause of the act of 1887-8; and thereafter, on motion of the plain-

tiff, the suit was remanded to the State Court on the ground that the amount in dispute did not exceed the sum of two thousand dollars, exclusive of interests and costs. (42 Fed. 420). Thereupon, the Pennsylvania Company petitioned the Supreme Court for mandamus to compel the Circuit Court to take jurisdiction and try the case. After disposing of other questions in the case, Mr. Justice Bradley, delivering the opinion of the court, said:

"We also agree with the circuit judge, that by the act of 1887, the matter in dispute must exceed the sum or value of two thousand dollars in order to give the Circuit Court jurisdiction, as well in cases sought to be removed from a State court on account of prejudice or local influence, as in other cases. It is true that the clause allowing a removal for such cause does not name any amount as requisite. The act of March 2, 1867, which first gave the right of removal for cause of prejudice and local influence at any time before the final hearing of the case, required that the matter in dispute should exceed the sum or value of five hundred dollars; which was the amount then required for the jurisdiction of the court in all ordinary cases, whether by original process or by removal from a State court; that is, in all cases except those in which jurisdiction was given independently of the amount in controversy.—14 State. c. 196, 558. This statute was carried into section 639 of the Revised Statutes, article 'Third.' Now as the act of 1887 raises the jurisdictional limit prescribed for the Circuit Courts in ordinary cases to an amount exceeding the sum or value of two thousand dollars (instead of five hundred dollars), we naturally expect to find the same amount required for its jurisdiction in cases of removal for cause of prejudice or local influence. The first section requires that amount in ordinary actions for original jurisdiction. The second section requires the same amount in ordinary cases removed from a State court. Its language is as follows: (Here follows section 2, paragraphed I, II, III, and IV, as hereinbefore set out in this brief.) The opinion then proceeds:

"Here the first two clauses expressly require an amount exceeding two thousand dollars. The third clause, in referring to 'any suit mentioned in this sec-

tion,' evidently means the first two clauses of the section, and, of course, is limited to cases in which the matter in dispute exceeds two thousand dollars. The fourth clause (the one in question) describes only a special case comprised in the preceding clauses. The initial words, 'And Where,' are equivalent to the phrase, 'And when in any such case.' In effect, they are tantamount to the beginning words of the third clause, namely: 'And when in any suit mentioned in this section.'

"On this point the circuit judge refers to an opinion of Mr. Justice Harlan in the case of Malone v. Richmond & Danville Railroad, 35 Fed. Rep. 625, which seems to us to express a correct view of the law. It is true, other judges have taken a different view; but, on a careful consideration of the subject, we have come to the conclusion above expressed." 137 U. S. 456.

Malone v. Richmond & Danville Railroad, 35 Fed. 625, which the Supreme Court thus approves as expressing "a correct view of the law," was a suit brought in a State court of North Carolina by a citizen of that State against a Virginia corporation, and had, upon petition of the defendant, been removed to the Federal court under the local prejudice clause of the present statute. The amount in controversy was less than two thousand dollars and upon that ground the case was remanded to the State court. Mr. Justice Harlan, after stating the case and setting out the several clauses of section 2 of the present statute, said:

"It is clear from the above clauses, construing them all together, that the right of removal, at any time before trial, on the ground of prejudice or local influence, is restricted, by the act of 1887, to suits in which there is a controversy between citizens of different States; also that such right, in suits of that character, involving no Federal question, now belongs only to the defendant who is a citizen, or to the defendants who are citizens of a State other than that in which the suit is brought. And I think it equally clear that the right of removal on the ground of prejudice or local influence does not exist in any case unless the sum or value of the matter in dispute exceeds $2,000, exclusive of interest and costs. The clauses of the second section of the act

of 1887, defining the different kinds of suits that may be removed, preserve the same element of the value of the matter in dispute as is found in the first section, relating to the original jurisdiction of the Circuit courts. This is done by the provision giving the right of removal in suits 'of which the Circuit Courts of the United States are given original jurisdiction by the preceding (first) section.' As by the first section the Circuit Court can take original cognizance, concurrent with the State courts, of all suits therein described, where the matter in dispute, exclusive of interest and costs, exceeds $2,000, the clauses in the second section, giving the right of removal in suits 'of which the Circuit Courts of the United States are given original jurisdiction by the preceding section,' necessarily restricts the right of removal to suits in which the value of the matter in dispute, exclusive of interest and costs, exceeds the above amount.

"It is, however, argued that, as the clause which specifies prejudice or local influence as an additional ground of removal in suits between citizens of different States, makes no mention of the value of the matter in dispute, the presumption is that Congress intended to give the rigth of removal in cases of that kind without reference to such value. In this view I am unable to concur. The first clauses of section 2 describe, as to their subject matter and the character of the parties, certain suits which may be removed from the State courts to the Circuit Courts of the United States, and, in the manner just indicated, attaches to the exercise of the right of removal the condition that the value of the matter in dispute shall exceed a named amount. The subsequent clause relating to prejudice and local influence, does not describe a new class of suits, removable from the State courts, but only specifies a distinct ground for removing one class of suits previously defined, namely, that class in which there is a controversy between citizens of different States. And that ground the defendant is at liberty to set up 'at any time before the trial'; whereas, by the third section of the act, the right to remove upon any other ground, will be lost, if not exercised at the time or before 'the defendant is required by the laws of the State or the rule of the State court' in which the suit is brought 'to answer or plead to the dec-

laration or complaint of the plaintiff.' The clause prescribing prejudice or local influence as ground for the removal of a suit 'in which there is controversy between a citizen of the State in which the suit is brought and a citizen of another State,' cannot well be separated, in the process of interpretation, from the preceding clause of the same section, which, by referring to the first section, requires as a condition of the removal of a suit becaues of diverse citizenship—the only kind of a suit in which the existence of prejudice or local influence, as affecting the right of removal, is of any consequence—that the matter in dispute shall exceed in value $2,000, exclusive of interest and cost. If in such suits having the required amount in dispute it is made to appear to the Circuit court that prejudice or local influence will prevent the defendant, who is a citizen of another State, from obtaining justice in the State courts, then the right of removal may be exercised 'at any time before the trial.' There is nothing in the previous legislation of Congress to justify a different interpretation of the act of 1887 from the one the court now gives. When the right of removal on the ground of prejudice or local influence was conferred by the act of 1867, (14 Stat. 558), Congress attached the condition that the matter in dispute should exceed the sum of $500,—the amount then required for the original jurisdiction of the Circuit courts of the United States in suits between citizens of different States. That condition was continued in the Revised Statutes of the United States, (section 639); and there is nothing in recent legislation to warrant the conclusion that Congress intended to authorize the removal from a State court of a civil suit or controversy between citizens of different States, upon the ground of prejudice or local influence, when the same suit could not, because of the small value in dispute, have been brought in a Circuit court of the United States." (35 Fed. 626-8.)

In Minnesota v. Northern Securities Co., 194 U. S. 48, 62, Mr. Chief Justice Fuller, speaking for the court, quoted from Tennessee v. Union & Planters' Bank, 152 U. S. 454, with *emphatic* approval, as follows:

"But the corresponding clause in § 2 allows removals from a State court to be made only by defendants, and

of suits 'of which the Circuit courts of the United States are given original jurisdiction by the preceding section,' thus limiting the right of a circuit court of the United States *on removal* by the defendant under this section to such suits *as might have been brought* in that court *by the plaintiff under the first section.*"

And in Madisonville Traction Co. v. St. Bernard Mining Co., Adv. Sheets, Oct. Term, 1904, p. 251, 196 U. S. . ., Mr. Justice Peckham, speaking for the court, treats the question as at rest in the following language:

"The rule is now settled that, under the judiciary act of 1887, 1888 (24 Stat. at L. 552, chap. 373, U. S. Comp. Stat. 1901, p. 608, 25 Stat. at L. 433, chap. 866, U. S. Comp. Stat. 1901, p. 508), a suit cannot be removed from a State court unless it could have been brought originally in the Circuit court of the United States," citing former decisions.

Manifestly, the present suit could not have been brought originally in the Circuit court of the United States. Diversity of citizenship was wanting.

The Act of 1887-88 *Construed in the Light of Prior Decisions.*

Returning to the case of the Sewing Machine Companies, 18 Wall. 553: The plaintiff, a Massachusetts corporation, brought suit in a State court of Massachusetts against a Connecticut corporation, a New York corporation and a Massachusetts corporation. The Connecticut corporation and the New York corporation each filed its petition in the State court for the removal of the cause under the local prejudice act of 1867. The applications for removal being overruled by the court in which the suit was brought and the ruling affirmed by the Supreme Judicial Court of the State, the case was carried to the Supreme Court of the United States where, after able argument and full consideration, it was held that in order to make the case removable all the defendants must have been non-residents of the State in which the suit was brought and all of them must have joined in the petition to the State court for removal.

And such was the uniform construction of that statute.

The description of the suit to be removed under the act of 1867 was the same as the description of the suit in clause 4 of section 2 of the act of 1887-88.

The changes as expressed in clause 4 relate to the party who may remove and the manner of removal; not to the character of the suit.

Under the act of 1867, the right was given to "such citizen of another State, whether he be plaintiff or defendant," on filing an affidavit in the State court to his belief in the existence of prejudice, etc., at any time before the final hearing or trial of the suit; while under the act of 1887-8 clause 4, the right of removal in the identical case is given to "any defendant, being such citizen of another State," at any time before the trial thereof, on making it appear to the Federal court that "from prejudice or local influence he will not be able to obtain justice in such State court," etc.

In Rock Island etc. Ry. Co. v. Martin, 178 U. S. 245, 247, Mr. Chief Justice Fuller, speaking for the court, after quoting section 2 of the act of 1887-8, says: "It thus appears on the face of the statute that if a suit arises under the Constitution or laws of the United States, or if it is a suit between citizens of different States, the defendant, if there be but one, may remove or the defendants, if there be more than one; but where the suit is between citizens of different States and there is a separable controversy, then either one or more of the defendants may remove."

Of course this means one or more of the non-resident defendants actually interested in such separable controversy, as held by Mr. Justice Brewer and Circuit Judge Thayer, in Western Union Telegraph Co. v. Brown, 32 Fed. 337, 342.

Whether in a removable case, that is, one having the requisite diversity of citizenship and amount, one or all of the defendants must make the application under clause 4, there is a distinct field for its operation. Under all the other clauses the application must be made to the State court, and within the time allowed for pleading. Under clause 4 the application must be made to the Federal court, which was not the case under the former statute. It may be made at any time before the trial. And, in addition to the requisite diversity of citizen-

ship and amount, the existence of prejudice or local influence must be shown as a fact—not as a conclusion as under the former statute.

It is altogether wrong to assume that because the statute permits "any defendant" to remove the cause, the other defendants may be citizens of the plaintiff's State. The language is just as applicable where all the defendants are non-residents; and, in view of the well settled meaning of the words descriptive of the suit, will be construed to apply only in such case.

We have seen that in the case of a separable controversy any one of the defendants to such controversy may remove that controversy; but the requisite diversity of citizenship must exist between all the persons opposed to each other as parties to such controversy. The want of such diverse citizenship in any individual party to such controversy is fatal to its removal. Indeed, the provision for the removal of a separable controversy is in itself a recognition and reaffirmance of the rule of unanimity as laid down in Strawbridge v. Curtiss. It was first suggested by the Chief Justice in that case that "where several parties represent several distinct interests, and some of those parties are, and others are not competent to sue, or liable to be sued in the courts of the United States," and there was a several, distinct controversy between parties having the requisite diverse citizenship, the court had jurisdiction of such parties and their several distinct controversy.

No one will contend that "either" defendant may remove when inseparably joined with a disqualified party. Such contention would be palpably untenable. Equally untenable is the contention that "any" defendant may remove under clause 4 when inseparably joined with a resident defendant. Diverse citizenship, the indispensable jurisdictional fact, is wanting alike in each case. Such is the case here. The suit is just as much a controversy between the plaintiff and the resident defendant as it is a controversy between the plaintiff and the non-resident defendant. The interest of the defendants is joint and inseparable. One is no more incidental to the controversy than the other; hence the suit is not one "in which there is a controversy between a citizen of the

State in which the suit is brought and a citizen of another State"; and all provisions for the removal of a suit of that description are inapplicable and immaterial.

In harmony with the decisions of the Supreme Court under former statutes and under the present statute are *the cases of* Anderson v. Bowers, 43 Fed. 321, by District Judge Shiras; Terre Haute v. Evansville etc. Co., 106 Fed. 545, by District Judge Baker; Campbell v. Milliken, 119 Fed. 982, by District Judge Riner; and Weldon v. Fritzlen, 128 Fed. 608, by District Judge Pollock, in which cases the right of removal in a case like this was denied.

The case of Whelan v. New York etc. Co., 35 Fed. 849, was decided upon erroneous theories as tested by the decisions of the Supreme Court. It held (p. 854, 35 Fed.), that no jurisdictional amount was specified as a condition of the right of removal; that clause 4 was a separate and independent provision referring to a class of cases not embraced in or covered by the three preceding clauses and not within the original jurisdiction of the Circuit Court; that an order of removal once made was final and not to be thereafter questioned by the plaintiff, and ignored the settled construction of the words descriptive of the suit. The decisions following that case have been cited by counsel for plaintiffs in error. We will not discuss them further than to say that in the larger number of them the question raised related to the citizenship of a plaintiff. Such was the Wilder case, 46 Fed. 676, by Mr. Chief Justice Fuller.

The Constitutionality of the Act of 1887-88.

II. If the act of 1887-8 should be construed as intending to confer upon the circuit courts of the United States jurisdiction of a suit between a citizen of the State in which the suit is brought on the one side and a citizen of another State and a citizen of the same State on the other side, it would be unconstitutional.

Prior to the adoption of the Constitution, each of the original States had complete and exclusive jurisdiction by its judicial tribunals over all legal questions of whatsoever nature, capable of judicial determination, and in-

In either case any attempt to add another distinct ground of jurisdiction would be futile.

We have already discussed the questions of interest and penalty as peculiar to the last trial. On all questions of pleading and evidence the rulings of the Circuit Court upon the last trial were in strict accord with the former decisions of the Court of Appeals and in all respects in harmony with the laws of Alabama as expounded by its highest court long before this case arose and reaffirmed in the recent case of Parks v. Bryant (January 17, 1905), 38 Southern Reporter, p. ....., herewith printed as an Appendix.

Moreover, in this recent case, the Supreme Court of Alabama cites with approval the cases of Montgomery County v. Cochran, 121 Fed. 17, and Montgomery County v. Cochran, 124 Fed. 456.

In further support of our contention that the last judgment is in accord with the law of Alabama, we beg to refer back and here adopt and apply the authorities set forth in the former part of this document against the granting of the writ of *certiorari, ante,* pages 18-25.

Respectfully submitted,

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JOHN G. FINLEY,
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Of Counsel.

APPENDIX.

[Supreme Court of Alabama, January 17, 1905.]

Parks *et al. v.* Bryant *et al.*

Action to Recover Damages for Breach of Official Bond of Register in Chancery.

[As prepared to be printed by the Official Reporter.]

1. *Action upon official bond; sufficiency of plea.*—In an action upon an official bond of a register in chancery to recover money received by such register, and deposited to his credit in a bank, whereby it was lost to the plaintiff by reason of the bank's failure, a plea which sets up as a defense that the sum claimed was received by the register who preceded the defendant in the office and by him deposited in said bank, and that upon the defendant's coming into the office, his predecessor gave him a check for said sum upon said bank, which check was placed to the credit of the defendant as register in chancery on the books of said bank, after which time the bank failed, presents no defense to the maintenance of the suit.

APPEAL from the City Court of Montgomery.
Tried before the Hon. A. D. SAYRE.

This suit was brought in said city court by C. F. Bryant and two others, against W. H. Parks, as the principal, and the United States Fidelity & Guaranty Company, as the surety, upon the official bond of said Parks as register in chancery for Montgomery county, to recover six hundred dollars for and on account of money of the plantiffs alleged to have been received by said Parks as said register and by him deposited to his credit as such register in the banking house of Josiah Morris & Company, whereby the said money was lost to the plaintiffs. The bond sued on is the same as in the preceding case of The United States Fidelity & Guaranty Company against Union Trust & Savings Company in the report of which case its contents are substantially set forth. The defendants each demurred to the complaint (as in the preceding case), and the demurrers were overruled by the court. Thereupon the defendants severally filed a number of pleas, the plaintiffs demurred thereto, and the demurrer was sustained. Pleas 3 and 4 were identical and as follows: "That the sum claimed in the complaint was received in his official capacity by one V. M. Elmore,

who was the predecessor of defendant Parks in the office of register in chancery of Montgomery county, Alabama; that on his retirement from said office, he gave to defendant Parks as his successor in office a check on the banking house of Josiah Morris & Co. for the money claimed in the complaint; that said Parks did not collect the said check, but had the amount named therein placed to the credit of sad Parks, as register in chancery, on the books of said Josiah Morris & Co.; that shortly afterwards the said Josiah Morris & Co. suspended payment and defendant Parks has never received the money claimed in the complaint." The grounds of the demurrer, sustained to said plea, were, that the plea showed that Parks received the money in his official capancity as register; that the fact that he received it in the shape of a check constituted no defense; that the plea showed a breach of the bond sued on; that the plea showed that Parks as register did collect the check given him by his predecessor. The cause being submitted to the court on the evidence, judgment was rendered for the plaintiffs against the defendants for $590.92 and costs. The assignments of error are based upon the rulings on the demurrers.

DOWDELL, J.—All of the questions presented by the record in this case, except the one raised by demurrer to the defendant's third and fourth pleas, were considered in the case of *The United States Fidelity & Guaranty Co. v. The Union Trust & Savings Co.*, decided at the present term of this court, and were there determined adversely to the contention of appellants.

The ruling of the trial court in sustaining the demurrers to pleas 3 and 4, remains only to be passed upon here. There was no error committed in sustaining the demurrers to these pleas.—*City National Bank v. Burns*, 68 Ala. 267, 275; *Alston v. State*, 92 Ala. 124; Morse on Banks & Banking, § 321; *National Bank v. Burkhart*, 100 U. S. 689; *Oddie v. The Natonal City Bank*, 45 N. Y. 735; *Montgomery County v. Cochran*, 121 Fed. Rep. 17; *Ib.* 126 Fed. Rep. 456.

There being no error in the record, the judgment will be affirmed.

Affirmed.

McCLELLAN, C. J., HARALSON and DOWDELL, J.J., *concurring.*

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JAMES H. McKENNEY,
Clerk.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1904.

No. ~~279~~ 37.

JOHN C. COCHRAN AND THE FIDELITY AND DEPOSIT COMPANY OF MARYLAND, PLAINTIFFS IN ERROR,

v.

THE COUNTY OF MONTGOMERY, DEFENDANT IN ERROR.

ERROR TO THE CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT.

AND

No. ~~401~~ 112.

JOHN C. COCHRAN AND THE FIDELITY AND DEPOSIT COMPANY OF MARYLAND, PETITIONERS,

v.

THE COUNTY OF MONTGOMERY, RESPONDENT.

Petition for Writ of Certiorari to the Circuit Court of Appeals for the Fifth Circuit.

STATEMENT OF MOTIONS.

The defendant in error in No. 279 has this day, pursuant to notice duly given and proved, submitted the following motion:

"Comes the defendant in error and moves to set aside and vacate the order made October 17, 1904, postponing the consideration of the motion to dismiss the writ of error until the case is reached for hearing on the merits, and to pass upon said motion at this term of the court."

And the respondent in No. 401 has this day submitted a motion, pursuant to notice duly given and proved, as follows:

"Comes the respondent in the above-entitled cause and moves the court to set aside and vacate the former order of the court in postponing the consideration of the petition for certiorari until the case of the same title on writ of error is reached for hearing in said court, and to consider and pass upon said petition."

The petition for the writ of certiorari is based upon the ground that the decision of the court of appeals is contrary to the law of Alabama.

Since this motion was postponed, the supreme court of Alabama has rendered a decision, on January 17, 1905, in a cause entitled Parks *et al. v.* Bryant *et al.*, 38 So., 180, in which that court reaffirms former State decisions followed by the court of appeals, and also cites approvingly the decisions of the court of appeals in this cause as reported in 121 Fed., 17, and 124 Fed., 456.

This recent decision of the supreme court of Alabama is printed as an appendix to the brief for defendant in error and respondent, filed here on the 22d day of April, 1905. (See the last two pages of that brief.)

That the decision of the court of appeals is final, see pages 9 to 16 of said brief.

And that there is no ground for certiorari, see pages 16 to 26 of said brief and Parks *v.* Bryant, *supra*.

Respectfully submitted,

WILLIAM L. MARTIN,
Attorney for Defendant in Error and Respondent.

APRIL 24, 1905.

Supreme Court of the United States.

Nos. 37 and 112.—October Term, 1905.

John J. Cochran and The Fidelity and Deposit Company of Maryland, Plaintiffs in Error, vs. The County of Montgomery.	In error to the United States Circuit Court of Appeals for the Fifth Circuit.
37	
John J. Cochran et al., Petitioners, vs. The County of Montgomery.	On certiorari to the United States Circuit Court of Appeals for the Fifth Circuit.
112	

[November 27, 1905.]

This action was brought January 21, 1902, in the City Court of Montgomery, Alabama, by the County of Montgomery, one of the counties of the State of Alabama, against John J. Cochran, a citizen of that county and State, and the Fidelity and Deposit Company of Maryland, a corporation of the State of Maryland, Cochran being the treasurer of the plaintiff county and the Fidelity and Trust Company of Maryland being the sole surety on the official bond of said Cochran as such county treasurer, to recover damages for certain alleged breaches of said official bond. Cochran was charged with the conversion of amounts belonging to the general fund of the county and of amounts belonging to the road and bridge fund. Demurrers to the complaint were severally filed by defendants in the State court.

February 15, 1902, the Fidelity and Deposit Company presented to the District Judge of the United States for the Middle District of Alabama, holding the Circuit Court, its petition for the removal of the cause into the Circuit Court of the United States for that district, alleging, among other things, that the matter in dispute exceeded the sum of two thousand dollars, exclusive of interest and costs, and "that the said controversy is between citizens of different States, in that the plaintiff was at the time of the commencement of said suit, and still is, a citizen of the State of Alabama; and your petitioner, The Fidelity and Deposit Company of Maryland, was at the time of the commencement of said suit, and still is, a citizen of the State of Maryland, and of no other State, having its principal office in the city of Baltimore, in the State of Maryland, and that your petitioner desires to remove this suit, which is now pending and undetermined in said State court, before the trial thereof, into the Circuit Court of the United States, to be held in the Middle District of Alabama."

The petition then averred "that from prejudice or local influence in favor of the plaintiff, and adverse to this defendant, it will not be able to obtain justice in said court or in any other State court to which the defendant may, under the laws of this State, have the right to remove said cause, on account of said prejudice or local influence;" that the suit was against John J. Cochran, the treasurer of said county, and petitioner, a surety company and a surety on the official bond of said Cochran as such treasurer, to recover the sum of one hundred and twenty thousand dollars, the full penalty of the bond; "and that by reason of the nature of said suit, all the residents and citizens of said Montgomery County have a direct interest in the recovery by the said plaintiff of the amount claimed."

It was further alleged that Cochran was "practically financially irresponsible" and therefore "practically only a nominal party to the suit," because the Surety Company "would be obliged to meet practically the whole claim should judgment be rendered against defendants;" and then set forth certain circumstances tending to show that there was local prejudice against the Surety Company "in any county in the State of Alabama in which said case should be tried." On the filing of the petition the judge entered an order finding that it appeared to the court "that from local prejudice or local influence" the Surety Company would not be able to obtain justice in the City Court of Montgomery, or in any other State court to which the company might have the right to remove the cause, and that the court was of opinion that it should be removed to the Circuit Court on the giving of bond in the penalty of one thousand dollars, and ordered the removal of the cause accordingly. The case came on to be heard in the Circuit Court at the May Term, 1902, when the plaintiff moved to remand upon the ground that the Federal court was without jurisdiction, one of the defendants being a citizen of the same State as the plaintiff. This motion was overruled. 116 Fed. Rep. 985. On the trial the plaintiff amended the complaint by adding four additional counts, to which demurrers were sustained; and the case was tried on the original complaint and the general issue and certain special pleas interposed by defendants. The result was a judgment in favor of plaintiff for the amount of the general fund converted, but under the rulings of the court there was no recovery on account of the road and bridge fund. On writ of error sued out by plaintiff this judgment was reversed and a new trial ordered by the Court of Appeals. 121 Fed. Rep. 17. On a second trial, May 28, 1903, the complaint was amended in certain particulars and three new counts added. The second trial resulted in a judgment in favor of plaintiff for an amount less than the amount claimed. On this judgment cross writs of error were sued out from the Circuit Court of Appeals, and the judgment reversed on the writ brought by plaintiff and a new trial ordered. 126 Fed. Rep. 456. The third trial, February 3, 1904, resulted in a judgment in favor of plain-

tiff for the full amount of the road and bridge fund converted by Cochran, with interest, less certain admitted payments made by him, and not including the amount of the general fund which had been in the meantime voluntarily paid by the company. On this last judgment, defendants sued out a writ of error to the Court of Appeals and the judgment was affirmed. 128 Fed. Rep. 1019. And thereupon the present writ of error was allowed. The case is numbered 37. Application for certiorari was made and is numbered 112.

Mr. Chief Justice FULLER, after making the foregoing statement, delivered the opinion of the Court:

The first question is whether this court can entertain jurisdiction of this writ of error, and this must be answered in the negative, if the ground on which the jurisdiction of the Circuit Court was invoked was "dependent entirely upon the opposite parties to the suit or controversy, being . . . citizens of different States," because in such case the judgment of the Circuit Court of Appeals was final. Act of March 3, 1891, 26 Stat. 828, c. 514, § 6.

By section one of the Judiciary Act of 1887, as corrected in 1888, (25 Stat. 433, c. 866,) the Circuit Courts of the United States are given "original cognizance, concurrent with the courts of the several States, of all suits of a civil nature, at common law or in equity, where the matter in dispute exceeds, exclusive of interest and costs, the sum or value of two thousand dollars, and (1) arising under the Constitution or laws of the United States, or treaties made, or which shall be made, under their authority; or (2) in which controversy the United States are plaintiffs or petitioners; or (3) in which there shall be a controversy between citizens of different States, in which the matter in dispute exceeds, exclusive of interest and costs, the sum or value aforesaid; or (4) a controversy between citizens of the same State claiming lands under grants of different States; or (5) a controversy between citizens of a State and foreign States, citizens or subjects, in which the matter in dispute exceeds, exclusive of interest and costs, the sum or value aforesaid, . . . and no civil suit shall be brought before either of said courts against any person by any original process or proceeding in any other district than that whereof he is an inhabitant, but where the jurisdiction is founded only on the fact that the action is between citizens of different States, suit shall be brought only in the district of the residence of either the plaintiff or the defendant; . . ."

Section 2 of the act provides for the removal of causes, as follows:

"That any suit of a civil nature, at law or in equity, arising under the Constitution or laws of the United States, or treaties made, or which shall be made, under their authority, of which the Circuit Courts of the United States are given original jurisdiction by the preceding section, which may now be pending, or which may hereafter be brought, in any State court,

may be removed by the defendant or defendants therein to the Circuit Court of the United States for the proper district.

"Any other suit of a civil nature, at law or in equity, of which the Circuit Courts of the United States are given jurisdiction by the preceding section, and which are now pending, or which may hereafter be brought, in any State court, may be removed into the Circuit Court of the United States for the proper district by the defendant or defendants therein, being non-residents of that State.

"And when in any suit mentioned in this section there shall be a controversy which is wholly between citizens of different States, and which can be fully determined as between them, then either one or more of the defendants actually interested in such controversy may remove said suit into the Circuit Court of the United States for the proper district.

"And where a suit is now pending, or may be hereafter brought, in any State court, in which there is a controversy between a citizen of the State, in which the suit is brought and a citizen of another State, any defendant, being such citizen of another State, may remove such suit into the Circuit Court of the United States for the proper district, at any time before the trial thereof, when it shall be made to appear to said Circuit Court that from prejudice or local influence he will not be able to obtain justice in in such State court, or in any other State court to which the said defendant may, under the laws of the State, have the right, on account of such prejudice or local influence, to remove said cause:

"*Provided,* That if it further appear that said suit can be fully and justly determined as to the other defendants in the State court, without being affected by such prejudice or local influence, and that no party to the suit will be prejudiced by a separation of the parties, said Circuit Court may direct the suit to be remanded, so far as relates to such other defendants, to the State court, to be proceeded with therein."

Section 3 of the act provides that, under the first three clauses of section 2, the petition for removal must be filed in the State court at the time or any time before the defendant is required, by the laws of the State or the the rule of the State court in which such suit is brought, to answer or plead to the declaration or complaint.

In *Smith* v. *Rines,* 2 Sumn. 238, Mr. Justice Story held that under the Judiciary Act of 1789 such cases were only liable to removal from a State to the Circuit Court "as might, under the law, or at all events under the Constitution, have been brought before the Circuit Court by original process." And Mr. Justice Washington in *Beardsley* v. *Torrey,* 4 Wash. C. C. 286, and Mr. Justice Thompson in *Ward* v. *Arredondo,* 1 Paine, 410, expressed views to the same effect. In *Gaines* v. *Fuentes,* 92 U. S. 10, it was ruled that this was otherwise under the act of March 2, 1867.

But the act of 1887 restored the rule of 1789, and, as we have heretofore decided, those suits only can be removed of which the Circuit Courts are given original jurisdiction. *Mexican National Railroad Company* v. *Davidson,* 157 U. S. 301; *Tennessee* v. *Union and Planters' Bank,* 152 U. S. 454, 461. And on the face of this record it is apparent that the

jurisdiction of the Circuit Court, as invoked, could only rest on diversity of citizenship. The case does not come within any other ground of original jurisdiction as defined by the act. It is true that one of the defendants was a citizen of the same State as the county of Montgomery, but the learned judge below held that where removal was sought on the ground of prejudice or local influence, the right of removal was not affected by another defendant and plaintiff being citizens of the same State as that where the suit was brought. 116 Fed. Rep. 985.

Whether that view was correct or not jurisdiction was exercised as resting on diversity of citizenship, that is, as between the plaintiff and the removing defendant.

But while the judgment of the Circuit Court of Appeals must be regarded as final and the writ of error dismissed, we deem it our duty to grant the writ of certiorari, to which the record on the writ of error may stand as a return, in order to pass upon the question of the jurisdiction of the Circuit Court, in the exercise of one of the essential functions of this court, the determination of the jurisdiction of the courts below. *Defiance Water Co.* v. *Defiance*, 191 U. S. 184, 195.

In applications for removal under clauses one and two of section two of the act of 1887, all the defendants were required to join in the application. *Chicago, R. I. & P. R. Co.* v. *Martin*, 178 U. S. 245; *Gableman* v. *Peoria, D. & E. R. Co.*, 179 U. S. 335. Under clause three, relating to cases of separable controversy, and clause four, all the defendants need not join. But the fourth clause, treating of removals because of prejudice and local influence, does not furnish a separate and independent ground of Federal jurisdiction, and, as Mr. Justice Bradley said in *In re Pennsylvania Company*, 137 U. S. 451, 456, "describes only a special case comprised in the preceding clauses." In that case we referred to the opinion of Mr. Justice Harlan in *Malone* v. *Richmond and Danville Railroad Company*, 35 Fed. Rep. 625, as expressing the correct view of the law. The question was whether the pecuniary limit was applicable under the fourth clause, and that involved consideration of the other clauses. Mr. Justice Harlan there said:

"It is clear from the above clauses, construing them all together, that the right of removal, at any time before trial, on the ground of prejudice or local influence, is restricted, by the act of 1887, to suits in which there is a controversy between citizens of different States; also that such right, in suits of that character, involving no Federal question, now belongs only to the defendant who is a citizen, or to the defendants who are citizens, of a State other than that in which the suit is brought. And I think it is equally clear that the right of removal on the ground of prejudice or local influence does not exist in any case unless the sum or value of the matter in dispute exceeds $2,000, exclusive of interest and costs. The clauses of the second section of the act of 1887, defining the different

kinds of suits that may be removed, preserve the same element of the value of the matter in dispute as is found in the first section, relating to the original jurisdiction of Circuit Courts. This is done by the provision giving the right of removal in suits 'of which the Circuit Courts of the United States are given original jurisdiction by the preceding [first] section.' . . . The subsequent clause, relating to prejudice and local influence, does not describe a new class of suits, removable from the State courts, but only specifies a distinct ground for removing one class of the suits previously defined, namely, that class in which there is a controversy between citizens of different States. And that ground the defendant is at liberty to set up 'at any time before the trial;' whereas, by the third section of the act, the right to remove, upon any other ground, will be lost if not exercised at the time or before 'the defendant is required by the laws of the State or the rule of the State court' in which the suit is brought 'to answer or plead to the declaration or complaint of the plaintiff.' The clause prescribing prejudice or local influence as ground for the removal of a suit 'in which there is a controversy between a citizen of the State in which the suit is brought and a citizen of another State,' cannot well be separated, in the process of interpretation, from the preceding clause in the same section, which, by referring to the first section, requires as a condition of the removal of a suit because of diverse citizenship—the only kind of suit in which the existence of prejudice or local influence, as affecting the right of removal, is of any consequence—that the matter in dispute shall exceed in value $2,000, exclusive of interest and costs."

The first subdivision of section 639 of the Revised Statutes was a reenactment of the twelfth section of the Judiciary Act; the second subdivision, of the act of July 27, 1866; and the third subdivision, of the act of March 2, 1867. The act of March 3, 1875, repealed the first and second subdivisions, but left subdivision three unrepealed. *Baltimore and Ohio Railroad Company* v. *Bates*, 119 U. S. 464, 467. The act of March 3, 1887, repealed the act of 1867, or subdivision three of section 639. *Fisk* v. *Henarie*, 142 U. S. 467. In describing the class of suits removable on the ground of prejudice or local influence, the language in the act of 1887 is identical with that of 1867, that is, suits "in which there is a controversy between a citizen of the State in which the suit is brought and a citizen of another State." The settled construction of the language of the act of 1867 and of the Revised Statutes was that the clause included cases wherein the controversy was between citizens of the State wherein the suit was pending and citizens of other States. The use of the identical language in the act of 1887–8 showed that Congress intended the same construction should be applied, although under the act of 1887 the plaintiff could not remove a cause, while any defendant, being a citizen of a State other than that in which the suit was pending, might.

The Circuit Court was of opinion that the words "any defendant, being such citizen of another State, may remove," etc., implied that there might be defendants who were not citizens of another State and yet the cause be

removable, but while the words, standing alone, are susceptible of that construction, we think it was not intended to change the meaning of the terms as previously determined, (by the decisions under the act of 1789, and so on down), and that the class of cases removable on the ground of prejudice and local influence is confined to those in which there is a controversy between a citizen or citizens of the State in which the suit is pending and a citizen or citizens of another or other States, and that the clause did not include cases wherein the controversy was partly between citizens of the same State. To hold otherwise brings the language of the clause into conflict with the rule that a suit to be removable must be within the original jurisdiction of the Circuit Court, departs from the settled former construction, and ignores the main purpose of the act of 1887, which was to restrict the jurisdiction of the Circuit Court. *Hanrick* v. *Hanrick*, 153 U.S. 192; *Anderson* v. *Bowers*, 43 Fed. Rep. 321; Moon on the Removal of Causes, § 189 and notes.

And there does not seem to be any escape from this conclusion in view of the provision of the first section of the act of 1887, that when the jurisdiction is founded solely on diversity of citizenship, suit can be brought "only in the district of the plaintiff or the defendant."

If brought in the district of the plaintiff or plaintiffs, the defendant or defendants (the singular embraces the plural) must necessarily be a citizen or citizens of another State than that of plaintiff or plaintiffs. If brought in the district of defendant or defendants no removal can be had, because it is only defendants who are "non-residents" who can remove under clause two, or under clause four, prejudice or local influence not being an independent ground of jurisdiction. But in order that a defendant entitled to remove might not be cut off from the exercise of that right by his codefendants declining to join in the application, the fourth clause provided that "any defendant" might remove, and out of abundant caution the words were added, "being such citizen of another State," apparently to prevent misconstruction of the words "any defendant," in possible enlargement of the jurisdiction.

The main purpose of the act of 1887 was, as has been repeatedly said, to restrict the jurisdiction, and this was largely accomplished in the matter of removals by withholding the right from plaintiffs and only according it to defendants when sued in plaintiffs' district.

In the present case suit was brought in the plaintiff's State against Cochran, a citizen of the same State, who was a necessary party, and the Surety Company, a citizen of Maryland. It could not have been brought in the Circuit Court for the Middle District of Alabama. *Sweeney* vs *Carter Oil Company*, *ante*, p.

And this being so, the case was improvidently removed and should have been remanded.

As the removal was made on the application of the Surety Company, that company must pay the costs of this court and of the Circuit Court.

Writ of error dismissed; certiorari granted, record on writ of error to stand as return to certiorari; judgment reversed and cause remanded to Circuit Court with a direction to remand to the State court; costs of this court and of the Circuit Court to be paid by the Fidelity and Deposit Company.

True copy.

Test:

Clerk Supreme Court, U. S.